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Toward a Comprehensive Definition of International Law

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TOWARD A COMPREHENSIVE DEFINITION
OF INTERNATIONAL LAW

by

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the Requirements for the Degree of Master
of Arts in Loyola University

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VITA

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CHAPTER I

NECESSITY OF A DEFINITION

About fifty years ago a young Roman boy used to play in a triangular shaped piazza before the Church of Santa Maria della Pace - Our Lady of Peace. ... As the boy began to study his Latin he must often have looked up to the two Latin inscriptions ... one on each side of a circular portico that bulges out from the front of the Church. On one side: Erit opus justitiae pax, et cultus justitiae silentium et securitas usque in aeternum. ... And on the other side: Orietur in diebus nostris et abundantia pacis.¹

That "young Roman boy" was Eugenio Pacelli, the now reigning Pope Pius XII. From that pair of inscriptions, "he must often have looked up to", Our Holy Father selected three of the first words as a motto for his coat of arms: opus justitiae pax. This motto Pius XII has constantly and courageously followed from his peace message on the date of his election down to his prayers for peace in the present hour. Indeed, "his acts, his words, his prayers all speak peace. .. a peace of justice and of charity between men and men, groups and groups, nations and nations, race and race."²

1 John P. Delaney, "When Vatican Microphones Broke the News to the World", America, LX (1939), 608-9.

2 Lillian Browne-Olf, Their Name is Pius, Portraits of Five Great Modern Popes, Bruce, Milwaukee, 1941 viii.

Now, limiting our consideration to a "peace of justice ... between ... nations and nations",³ we ask: whence this peace of justice and charity of the Pope; whence that ordo, which St. Augustine calls the matter of peace, whose form is tranquillitas?⁴

Order, the Scholastics say, is dispositio plurium in unum, a directed multiplicity. Direction, of course, implies purpose, a goal sought (in unum); a proper disposal of a complexity (dispositio plurium) toward that goal demands a guide-post, a norm. Now, when these ideas are applied to man and his free actions, the goal becomes variously an harmonious domestic, social or political order, individual beatitude, the glory of God Himself; and the guide-post becomes the norm of morality. Further, when delimited to man in the international order, the goal becomes particularly international concord; the directive norm, international law. Hence, we see that the tap-root of the tree of international relations is international law; hence we see that peace in the international order is the work of a justice based on international law; hence we see, finally, the basic import of the general theme of this paper, a clear concept of international law.

That this concept needs definition anyone can see from a casual

3 Ibid., viii.

4 St. Augustine, De Civitate Dei, ed. by B. Dombart, Teubner, Leipzig, 1877, XIX, 13.

reading either of popular literature or of official statements and documents. To begin, then, with the former.

In one of the many recent books on peace after victory we read the following:

... Hitler has struck an unprecedented blow against all the well-established standards of International Law. It is the very concept of International Law which has been injured. International Law had slowly grown during at least 200 years and had assumed, in spite of the continued international anarchy, a reality in the minds of the people.⁵

And, this we compare with the following excerpt from a rather extended study on the reality of international law.

Why do Foreign Ministers and Secretaries of State consult legal advisers about International Law. .. Why does the constitution of the United States, which according to Chief Justice Marshall, cannot be presumed to contain any clause which 'is intended to be without effect', give Congress the power 'to define and punish ... offenses against the law of nations'? Why has the United States Supreme Court, like the courts of most other countries, asserted that 'International Law is part of our law'?⁶

Just what each of these authors means by international law we are not quite sure; that they seem to mean different things is quite possible. The author of Victory is Not Enough apparently views international law as a dynamic concept that has grown to reality. Mr. Jessup, on the contrary, would equate the notion "law of nations" as incorporated in

5 Egon Ranshoffen-Wertheimer, Victory is Not Enough, W. W. Norton & Co., Inc., New York, 1942, 162-3.

6 Philip C. Jessup, "The Reality of International Law", Foreign Affairs, XVIII (1940), 244-6.

our Constitution in 1789 with the concept "international law" about which present-day Foreign Ministers and Secretaries of State consult legal advisers.⁷ His is a static concept of the law.

In contrast to these vague uses of the term international law, are the two following statements:

International Law, viewed as a formulation of the customs of civilized nations in the conduct of their mutual relations, has become a great corpus of jurisprudence through the consensus of experts working in the field.⁸

What we are really fighting for, it begins to appear, is the status quo. Or, as others call it, international law and order. .. This has for years been official U. S. foreign policy. .. The (State) Department's most recent clarification of its policy is in Peace and War, the White Book. .. It may be summarized in four principles: (1) respect for the territorial integrity and the sovereignty of each and all nations; (2) noninterference in the internal affairs of other countries; (3) equality of all nations, including equality of commercial opportunity; (4) nondisturbance of the status quo except by peaceful means.

These principles are all basic to the code of behavior known as international law, as it was generally understood before this war. Along with the first and great commandment of all law - pacta sunt servanda, or "keep your word" - they underlie practically all important international treaties, customs, and procedures.⁹

7 Ibid., 244.

8 Owen J. Roberts, Asst. Justice U. S. Supreme Court, "Supra-National Law, Vital Speeches, IX (1943), 457-8.

9 Editorial: "What is our Foreign Policy", Fortune XXVII (1943), 126-7.

Certainly Justice Roberts is definite about the meaning of international law. Yet at the very time he is limiting his usage to custom, the considered policy of his own State Department is summarized as the preservation of the status quo, or, as others call it, "international law and order".¹⁰ For one, "the customs of civilized nations" are international law; for the other, "the status quo" is international law. It is not apparent either that the customs of the nations are the status quo.

In connection with the first of the four principles given above as summarized from the White Book, an excerpt from the article on international law in the Encyclopaedia of Social Sciences is interesting. Peace and War asserted the principle of unimpaired sovereignty as "basic to the code of behavior known as international law".¹¹ Borchard's article in the Encyclopaedia states that international law, if it is law at all, "must necessarily limit the omnipotence or sovereignty of the State".¹²

The note of doubt sounded by the last authority over our unknown soldier, international law, is also heard in different keys and with varying degrees of lugubriousness. Some would assert with Elihu Root that "international law was not like a tea-cup or a pitcher which, once

10 Ibid., 126.

11 Ibid., 127.

12 Edwin M. Borchard, "International Law", Encyclopaedia of Social Sciences, Macmillan, New York, 1937, VIII, 172.

broken, was irretrievably ruined".¹³ Some would, with Robert Strausz-Hupe, admit that the leopard changed his spots and, consequently, the lebensraum "replaces the obsolete principle of International Law".¹⁴ Some finally, would openly affirm with a former Assistant Secretary of State that

In former years we were intent upon discussing the content and the rule of International Law, - what it permits under a given situation and what it prohibits. Now we are reduced to the stark question of whether or not a law of nations¹⁵ is to be recognized as in existence.¹⁶

Popular literature, then, presents a crazy-quilt of meanings for the term international law.¹⁷ Surely, though, the language of official document and pronouncement will be more clear. Let us see.

13 Elihu Root, Address at Disarmament Conference, Washington, 1921.

14 Geopolitics, Putnam, New York, 1942, 87.

15 On the term, law of nations, it might be thought some agreement could be found. Recall, however, that by the Constitution Congress has power to punish "offenses against the law of nations", or international law. In this sense of international law, Francis Sayre uses the term, law of nations. Another authority, however, calmly disrupts this agreement in meaning with the following statement: "Les droit des gens se superpose donc aux droit nationaux au sommet de l'édifice juridique universel.

Cependent le droit des gens lui-même se divise en plusieurs degrés.

Les degrés superieurs sont constitués par les règles du droit international commun, sur lequel se basent les règles particulières". (A. Verdross, "droit International de la Paix", Recueil de Cours, Academie de droit International, Librairie Hachette, Paris, 1931, XXX (1929), 292).

16 Francis B. Sayre, "The Challenge of International Law", Vital Speeches, IV (1938), 467-8.

17 We have cited here but a few of the many examples of divergence that could be adduced. If the reader would care to search farther afield he will find the following references helpful: Aufricht, A.,

It is his impression that the American Government is now resorting, under plea of self-defense, to measures over and beyond those that are generally recognized by International Law.¹⁸

Here, the term international law, might have any of the several meanings met with above and yet, whatever the meaning, it should accord, one would think, with the language of similar official documents.

"Personality in International Law", Am. Pol. Sc. Rev. XXXVII, 217-43.

Beck, "Future of International Law", Cath. Mind XLI, 48-53.

_____, "Essential Conditions for International Order", Tablet, CLXXX, 112-3, 237-8, 260-1, 284-5, 535-6.

Fenwick, C., "International Law and Order", Commonweal, XXXIV, 94-6.

Finlayson, C., "Vitoria, the Founder of International Law provides guidance for Today", Commonweal, XXXVII, 10-12.

Hartnett, R., "A Good Look Backwards Gives a Better View Forwards", America, LXIX, 677-8, 781-2.

Hoffman, R., "American Tradition and the Coming Peace", Thought, XVIII, 197-201.

Jessup, P., "Reality of International Law; Vital Factor in War-Time Diplomacy", Current History, LI, 13-15.

Keenan, C., "World Order Requires Rule of Law, Not of Men", America, LXVIII, 705-6.

Masse, B., "Popes want Peace", Catholic Mind, XLI, 12-20.

Masterson, W., "What is Left of International Law", Scholastic, XXXVI, 8-9.

Payzo, T., "The Organization of International Law", America, LXIX, 289-90.

Rueve, S., "Some Thoughts on International Law", Modern Schoolman, XVII, 27-8.

Ward, B., "International Order and the Natural Law", Blackfriars, XXIV, 258-63.

Williams, B., "What is International Law", Scholastic, XLII, 7-8.

- 18 Nomura, Japanese Ambassador, "Document Handed by Japanese Ambassador to the Secretary of State on November 7, 1941", transl. (tentative) by Joseph C. Grew, Prelude to Infamy, Official Report on the Final Phase of United States-Japanese Relations, October 17-December 7, 1941, United States News, New York, 1942, 15.

Still, we read:

We, (Germany) followed these rules and would like to follow them in the future. It is entirely up to England to carry out her blockade in a form compatible with international law or incompatible with international law. We will adapt ourselves thereto.¹⁹

In the first statement the United States is accused of not following directions as indicated by the sign-post of international law. In the second, Germany would follow directions but the directions here are indicated by a weather-vane, English procedure. To the first party, the norm of law is an absolute; to the second, it seems relative, conditional.

The Covenant of the League of Nations states in the preamble that

THE HIGH CONTRACTING PARTIES

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honorable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, ...²⁰

while further on in Article XIII, we read:

19 A. Hitler, Speech at Danzig, September 19, 1939 in My New Order ed. Raoul de Roussy de Sales, Reynal & Hitchcock, New York, 1941, 452.

20 "The Covenant of the League of Nations", in J. Eppstein, Catholic Tradition of the Law of Nations, Catholic Assoc. for International Peace, Washington, 1935, Appendix III, 475-488.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent or nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.²¹

How is the term, international law, understood in this official document? Messrs. Simonds and Emeny interpret for us:

What, after all, is the primary condition of any international association which is not foredoomed to futility? Obviously an agreement on the part of all nations, ... not merely to respect the territorial integrity and political independence of one another, but also to take common action against any nation, great or small, which violates this fundamental contract. That commitment Woodrow Wilson himself correctly described as the very heart of the whole league conception. For, if nations will not obey the law, then the law has no moral validity; and if they will not agree to enforce it, then it can have no practical value.²²

Here is a law, then, which, according to competent interpreters, once broken no longer has moral validity. Yet of this same international law (at least the same words are used though the meanings are obviously different) Pius XI said:

It cannot be denied that in the Middle Ages this law (international) was often violated; still it always existed as an ideal, according to which one might judge the acts of nations, ...²³

21 Ibid., 480.

22 Simonds and Emeny, Great Powers in World Politics, American Book Co., New York, 1937, 556-7.

23 Pius XI, Ubi Arcano Dei, in Koenig, Principles of Peace, N. C. W. C. Bruce, Washington, 1943, 347.

If the law is not obeyed, then it has no moral value, the interpreters say; "often violated; still it always existed", the Pope said.

As if confusion were not enough, we find it thrice confounded when we place three other documents in parallel. Firstly,

The Governments of the American Republics, having considered ... that Pan-Americanism, as a principle of American International Law ... requires the proclamation of principles of American International Law, ...²⁴

secondly,

In order to free the Germans remaining in Poland as well as the Poles remaining in Germany, from the feeling of being deprived of the benefits of international law ...²⁵

and, lastly,

Moreover, since the world seems to have forgotten the peaceful message of Christ, ... We have been forced to witness a series of acts irreconcilable alike with the precepts of positive international law and those of the law of nature, as well as with the elementary sentiments of humanity; ...²⁶

There can, be, then, under one meaning, an American international law.

Yet according to the general denotation of the words there seems to

24 "Declaration of Principles of Inter-American Solidarity and Cooperation", in Simonds & Emeny, lxvii.

25 "Proposal for a Settlement of the Problem of Danzig and the Polish Corridor and of the German-Polish Minorities Question", transl. in Document on the Events Preceding the Outbreak of the War, publish. by German Foreign Office, German Library of Information, New York, 1940, 488.

26 Pius XII, In Questo Giorno, in Koenig, 634.

be a contradiction involved. By another terminology, there can be an appeal to the benefits of international law for the individual. Yet, again, the terms "international" and "individual" seem to act at cross purposes. There can be, by a third interpretation, a positive international law. And this, of course, further complicates matters by implying its correlative, natural international law.

As a summary and symbol, then, of all this lack of agreement in fundamental terminology²⁷, let us use a picture and its caption as they appeared in a recent number of a current magazine. The picture:

27 It should be noted that when we spoke of "confusion", "divergence", "lack of agreement" in terminology we neither approved nor condemned anyone. Our purpose was to show objectively from actual citation different uses of the term, international law, in both popular and official literature. Our purpose was to show objectively the need of a definition. For as M. Strupp says: "Il y a quelques années, un auteur de droit international bien connu, le professeur Spiropoulos de l'Université de Salonique, a remarqué à juste titre qu'une grande partie des difficultés et controverses concernant le droit international provient de ce que chacun s'obstinant à trouver une définition pour telle ou telle conception, use d'une nouvelle terminologie et qui lui est propre". (K. Strupp, "Droit de la Paix", Recueil des Cours, XLVII, 268).

Again, should the reader desire other examples of confused terminology in official documents he will find the following citations helpful:

"Declaration made by the German and Polish Governments", Documents of Events Preceding War, No. 37.

Hitler, My New Order, Speech to Reichstag, 367.

Op. cit., Speech to Duesseldorf Industry Club, 96-7.

"Lateran Treaty", in Parsons, Pope and Italy, America Press, New York 1929, 85, 87, 88, 92.

Pius XII, Summi Pontificatus, in Koenig, 594, 604, 605.

Quoniam Paschalia, in Koenig, 558.

an off-angle photo of the United States' State Department buildings as seen over the shoulders of armed sentries, through the bars of the high iron fence. The caption: "The New Headquarters of International Law: State Department, Washington, D. C."²⁸

* * *

The work of this paper, then, is that of the diamond master: the cutting and polishing of the international-law concept until it is ready to be set as the main stone in the ring of international union. Our procedure will be, first, to trace the history of the concept; secondly, to take the trinity of accepted founders of modern international law, Francis Vitoria, Francis Suarez and Hugo Grotius, together with the two War Popes, Benedict XV and Pius XII, and extract from their principal writings the notes they would each contribute to a joint definition of international law. Finally, we will formulate and explain a definition of this law in the light of the foregoing study.

²⁸ Fortune, XXVII, (1943), 126.

CHAPTER II

HISTORY OF THE CONCEPT

St. Thomas, when evolving his general definition of law, posits a broad, generally accepted, working notion of his term as a point of departure.¹ Following this example and having an eye to delimiting the field of examination, we forthwith present a working definition (merely etymological) of international law. -- International law is a rule of the actions of nations in dealing with one another.

Let us examine the historical evolution of international law, then, as thus broadly characterized.

Turning back the pages of legal history even to pre-Greek and Roman days, it is certain on the basis of actual findings that the ancients had laws governing their interrelations and institutions for the execution of these laws. "The laws of Hammurabi, the excavations and papyri of Egypt, the tablets of Babylonia and Assyria, etc., brought us an abundance of material, so that there can be no doubt on the question".² Baron Korff goes on to add even greater details. He says:

1 St. Thomas, Summa Theologica, 1^a 11^{ae}, 90, 1, resp.

2 Baron S. Korff, "An Introduction to the History of International Law", American Journal of International Law, XVIII (1924), 246.

... glance at the recent discoveries at Sumer, dating back to the Fourteenth Millennium B.C. Among them was a treaty signed by King Entemena relating to boundaries. ... According to international agreement an umpire or arbiter was appointed in the person of another king, Misilim of Kish. ... The famous treaty of Rameses II concluded in 1280 B.C. ... is the best known case. This was not only a treaty of peace imposed on a vanquished opponent, but an alliance for future cooperation.³

From these facts as premises, we can safely conclude that there was an international rule of some sort at least in the world of the near-East.

It is a curious fact, which we would like to consider briefly before passing on to the times of Socrates and Cicero, that the Oriental world was even in this early period well advanced in international affairs. For

Non seulement elle (la Chine) est arrivée depuis long-temps ... à la négation de souveraineté absolue et du droit de guerre arbitraire ... et elle a posé là les distinctions des .. les principes généraux qui commandent le droit du temps de paix comme celui du temps de guerre ...⁴

China's great philosopher, Confucius, even laid down two fundamental principles for unity among the Chinese States, namely, first, the practice of good faith between the various States and, secondly,

3 Ibid., 249.

Cf. also Paul Vinogradoff, Outlines of Historical Jurisprudence, Oxford, New York, 1920, 2 Vols.

4 L. Le Fur, "La Théorie du Droit Naturel", Recueil des Cours, XVIII, 279.

marmonious concord between these States.⁵ The philosopher talks of the "création d' une 'Grand Union' de tous les Etats de la Chine".⁶ And lest anyone think that a union of Chinese States is hardly the foundation for an international law, M. LeFur adds that the very title of the Chinese Ruler, "Son of Heaven", was indicative of the Chinese mind. To them, indeed, such a union "signifie à la fois la Chine et le monde".⁷

To turn back to the West again, let us consider the state of international law among the Greeks and Romans.

The question of international law in Greece takes the form of a problem: did or could the Greeks have an international law? The answer to this question takes the form of contradictories, for, "sur ce point ... deux opinions absolument opposées, contradictoires, disent les meilleurs esprits".⁸

1911 is the great divide in the history of Greek international law. At that date Coleman Phillipson's authoritative work⁹ on the subject appeared. From that date the various currents of this historical

5 Ibid., 279, (cf. also S. Seferiades, "Droit de la Paix", Recueil des Cours, XXXIV, 217-18.

6 Ibid., 279.

7 Ibid., 280.

8 L. Le Fur, 272.

9 Coleman Phillipson, International Law and Custom of Ancient Greece and Rome, Macmillan, London, 1911, 2 Vols.

problem are reckoned. Either they flow to the left following the courses dug by Wheaton, Kent, Lawrence, Mitford, and other predecessors of Phillipson;¹⁰ or they flow to the right with Korff and Redslob through the channel cut by Phillipson himself.¹¹ The former school deny there was an international law in Greece; the latter affirm the existence of such a law.

The argument of the "leftists" may be briefly stated with M. Le Fur, thus: "ces auteurs se basent à la fois sur les faits et sur les doctrines des anciens".¹² The facts are these: 1) There were no independent nations at that day, but only the individual Greek city-states, beyond the lands of which all were barbarians. 2) If there were any relations within the Greek world they were intermunicipal and not international. 3) There was a continual state of war even in philosophical Hellas. 4) There was no regard for the sanctity of treaties and agreements even between the Greeks themselves.¹³ The doctrines referred to are these: 1) There was a fundamental misconception of international relations, even of the law that would govern such relations.¹⁴ 2) If there was any "international" action, it was based on notions of re-

10 cf. Ibid., 46 and 49.

11 cf. L. Le Fur, Recueil des Cours, 273; also Korff, Recueil des Cours, 1923; and Redslob, Histoire des grandes principes du droit des gens.

12 L. Le Fur, 274.

13 Ibid., 274.

14 Phillipson, 46-7; also P. Vinogradoff, Historical Types of International Law, in Bibliotheca Visseriana, Brill, Leyden, 1923, 13.

ligion, namely, religious unity and the sanctity and binding force of the religious oath.¹⁵ Before committing ourselves let us hear the affirmative side of the case. To emphasize the antinomy we can summarize the "rightist" argument in the very statement quoted above: "ces auteurs se basent à la fois sur les faits et sur les doctrines des anciens".¹²

The facts are thusly marshalled: 1) The Greek concept of a state was co-extensive with the Greek city which enjoyed, after the fashion of the modern nation, independence and autonomy. Whence it follows, as Sir Paul Vinogradoff observes, that "the Greek world was particularly well adapted to the development of a certain kind of international, or, -- to speak more correctly -- intermunicipal relations".¹⁶ Hence, intermunicipal law was as truly international law, as the Greek municipality was the counterpart of our nation. 2) Further, not only could such laws exist but they did. Economic necessity forced inter-city relations and a corpus of law governing such.¹⁷ 3) Attempts, at least as successful as the League of Nations of our own day, or the "Concert of Europe" engineered by Count Metternich in 1815, were made at confederation and league formation. "The most potent influence

15 Phillipson, 49; also Vinogradoff, Historical Outlines, II, 162.

16 Vinogradoff, Historical Outlines, II, 153; also Vinogradoff, Historical Types, 13.

17 Vinogradoff, Historical Outlines, II, 153; also Vinogradoff, Historical Types, 15.

was exercised by the Athenian-Delian league".¹⁸ Then there were the Amphictyonic Leagues under obligations endorsed by the Amphictyonic Council.¹⁹ The attempted consolidations of Themistocles and Pericles for the prosecution of the Peloponnesian war, the oligarchical confederation of Boeotia²⁰ were other moves toward cooperation. It should be noted, too, as the protagonists of Greek international law point out, that this

international intercourse was conducted under customary rules and under treaties. A number of the latter have come down to us ... and we can judge from them to what extent ... arbitration was resorted to ... It was a natural outcome of conflicts between cities anxious to settle disputes by legal process.²¹

In fact, taken as a whole these institutions in their origin and in their work

démontrent de façon péremptoire, semble-t-il, qu' un droit international de la paix, de nature à peu près analogue à celle du droit international de notre époque.²²

From the doctrinal standpoint, the case is equally cogent, the "right-ists" maintain. 1) Numerous authors can be cited in whose works not only the notions of law, but the basic notions, at least, of an international law are found. Thus Sophocles and Aristotle surely had clear

18 Vinogradoff, Hist. Outlines, II, 158-9; also Hist. Types, 18.

19 Seferiades, 218; also Korff, 251; Phillipson, 31; Vinogradoff, Hist. Types, 21.

20 Vinogradoff, Hist. Types, 18.

21 Vinogradoff, Hist. Outlines, II, 160.

22 Seferiades, 220.

notions of a universal law obligatory for all men. The former, speaking through the person of Antigone defies Creon's command in virtue of a higher law.²³ The latter both in his Rhetoric and in his Politics distinguishes between a particular and a universal law which is applicable alike to an individual, a state, or the community of mankind.²⁴ Then, too, one has but to glance at the inscriptions, coins, and medals of the period as well as the writings of some Greek historians, Polybius, Thucydides, Xenophon, Herodotus to be convinced of a Greek international law.²⁵ Finally, one well known Greek scholar and legal authority affirms

Something has been said already of the Pan-hellenic feeling of the fourth century, more especially as represented by Socrates, and of Plato's sympathy with that feeling. The end of the fifth book of the Republic bears evidence ... to the depth of his conviction ... He advocates a foreign policy of alliance, or, at any rate amity, among the States of Greece in opposition to 'barbarians'. ... The permanent interest of Plato's argument lies in the light which it throws on his ideas of international law and international morality. Though he may make the State absolute within, Plato is far from thinking that it is absolute, or free from limitation, in its external life. ... Plato does not transcend the distinction ... between the Greek and the barbarian; ... but he has a clear conception that the Greek world, at any rate, is a single society, with a civility or comity of its own, to which all its members are bound to conform.²⁶

23 L. Le Fur, 272.

24 Phillipson, 50-55.

25 Phillipson, 1, 66.

26 Barker, Greek Political Theory, Plato and His Predecessors, Methuen, London, 1918, 264-5.

2) By conviction treaties, leagues, and agreements among the Greeks were fortified by the bond of wages, oaths, or payments to Zeus.²⁷ -- And to violate such was to lose "face" in the Greek world.²⁸ Consequently, the "rightists" would add as a clinching argument,

the main difference (between Greek international law and ours is) that now our rules mostly flow from explicit agreement as representing the major premise, whereas in antiquity rules of law were not only referred to the act of agreement as their source but largely to religion and morality as necessary by dictating an implicit acceptance or agreement.²⁹

These are the pros and cons of the problem of Greek international law. Wherein lies the solution? The dilemma is solved by citing a third possibility, namely, the combined truth of the negative and affirmative propositions. An example on a question of fact handled in scholastic form will clarify the point. Negative side: There were no independent nations among the Greeks. Therefore, they could have had no international law. Distinguo: There were no nations as we know them, we concede; but that there was nothing comparable to our nation, we deny. Affirmative side: Greek city-states were independent like our nations. But the rule for relations between our nations is international law. Therefore, the rule of city-state relations is also. Distinguo: The city-states are comparable to our nations in the sense

27 Vinogradoff, Hist. Types, 20.

28 Vinogradoff, Hist. Outlines, II, 162 ff.

29 Phillipson, 1, 27-28.

of being the same in all important respects, we deny; but that there is a good analogy in many respects, we concede.

Hence, we add, a tertium quid really is true. Inasmuch as the Greek cities are comparable to our nations (and even an historical basis for them) so the laws governing their interrelations are analogous to our international law (and even their legitimate ancestors).³⁰ Let us conclude by summarizing the whole question with M. Le Fur.

la solution consiste à mes yeux dans une distinction essentielle. Il existe parfois dans l'antiquité un droit international se rapprochant à beaucoup d'égards du nôtre, mais c'est entre cités voisines de même langue, de même race, et de même religion, comme dans les amphictiones grecques et les confederations étrusques; en dehors de ce cas -- auquel il faut peut-être ajouter celui de nations même étangères de race et religion, mais ayant conclu un traité d'amitié ou d'aillance garanti par des serments religieux, le grand lien d'alors en principe entre nations au cités étangères, il n'y a pas de droit international ou sens actuel du mot, parce qu'il n'y a alors ni loi commune, ni reconnaissance de l'égalité de droit des diverses races ou nations.³¹

As we move further West and visit the Romans, we are tempted to jump to the conclusion that, if the Greeks had at least an analogous international law, surely the Rome of law and order must have far outstripped their Hellenic predecessors. The temptation is but a "booby-trap", for again a problem faces us; again contrary solutions

30 cf. Phillipson, l, 50 and Vinogradoff, Historical Outlines, II, 153.

31 L. Le Fur, 278.

are offered.

The problem here is three-fold: 1) Could and did the Roman world admit of an international law; 2) Was the Roman jus fetiale an international law; 3) Was the jus gentium of the Romans international law?

The first of the problems admits of easy solution. The majority of writers³² on the possibility and actuality of Roman international law would distinguish roughly two periods of Roman history. The first, ending somewhat after the Punic wars, was a period when Rome dealt on a nation-to-nation basis with other peoples. The second, the latter days of the Republic and the period of the Empire, was

l'époque où Rome crut devoir imposer autour d'elle sa paix à elle, la paix romaine, rejetant toute conception d'égalité avec ses voisins, époque presque contemporaine de la fondation de cette cité, un droit international, tel que nous le concevons de nos jours ou même tel que nous l'avions rencontré dans les cités grecques, ne pouvait certainement pas exister.³³

Hence, the days which gave foundation for the "grandeur that was Rome"; the days in which the Mediterranean could be spoken of as a Roman lake; the days when all the world was at peace due to the vast rule of Augustus, were days that could hardly admit of an international law.³⁴

With regard to the second problem we need but to nod assent. It

32 cf. Vinogradoff, Phillipson, Seferiades, LeFur, Korff, Scott, et alii.

33 Seferiades, 288.

34 It should be noted that even in this latter period, as we shall see, Rome had a decided indirect (and even some direct) influence on the historical development of international law.

is generally recognized that

the Roman system of international relations and the principles on which these relations were based, was embodied in the well-known jus fetiale, interpreted and applied by the fetial college (Collegium Fetiale).³⁵

It is likewise recognized that it was the fetial college which acted "sur toute question rentrant essentiellement dans le cadre du droit international, tel qu'il est compris de nos jours".³⁶

We turn, then, to our final problem: Was the Roman jus gentium international law? -- Throwing out this question is like breaking open a bee hive. One is sorely tempted to flee the multiplicity and diversity of answers given. -- Let us gather the opinion into affirmative and negative camps.

On the negative side we find Korff,³⁷ Vinogradoff,³⁸ Seferiades,³⁹ Savigny,⁴⁰ Maine,⁴¹ and others. Here is their opinion in sum: "le terme même de jus gentium, emprunté au droit romain par un nombre élevé d'internationalistes célèbres, pour désigner les règles du droit international, doit-il être considéré comme absolument malheureux"?³⁹

What then was jus gentium? It was conflict law or private international law. Jus gentium under the praetor peregrinus grew up as Rome began

35 Korff, 252.

36 Seferiades, 230.

37 op. cit., 253.

38 Historical Types, 25.

39 op. cit., 229.

40 Phillipson, 1, 71.

41 Ibid., 1, 70-1.

dealing with others than Romans. "It may be noted that this private international law was a jus gentium (italics added) not a jus civitatum".³⁸

Why private? Because "historical investigation proved ... that (jus gentium) was nothing else but the Roman civil law applied to special circumstances concerning the foreigners and the outside, non-Roman, world".³⁷ It is true the authors on this side of the case have a variety of explanations as to the origin and development of jus gentium⁴² but the final product for them is a law governing the relations of the Roman civis with someone of another nation.

From the affirmative camp we hear the voices of Puchta,⁴³ Nettleship,⁴⁴ Rudorff,⁴⁵ and Phillipson.⁴⁶ These legalists would hold with the Italian, Baviera, that "jus gentium (when all is said and all distinctions are made) represents both the private and the public international law of Rome".⁴⁷ And by public international law they would mean a law "regulating the relationships between states qua states".⁴⁸

Such, briefly, is the case for jus gentium. It remains to be seen what conclusion we can come to.

42 J. Brown Scott, Law, the State, and the International Community, Columbia U. Press, New York, 1939, 2 Vols., cf. Vol. I.

43 Phillipson, 1, 72.

44 cf. Scott, Vol. I, Appendix.

45 Phillipson, 1, 75.

46 op. cit., esp. 1, 96-110.

47 Il diritto internazionale dei Romani cited in Phillipson, 1, 94.

48 Ibid., 1, 75.

Clearly, the affirmative side does not deny the case of the negative but merely adds that the notion of public international law should be included under jus gentium. The truth seems again to lie in a distinction. The Romans did have group-to-group relations with the States, tribes, nations about them. And these relations were "sometimes referred to under jus fetiale, sometimes jus belli et pacis, sometimes jus gentium. These rules did not, of course, constitute an international law in the modern sense of the term".⁴⁹ Therefore, jus gentium was a sort of international law. Yet the very last words of the above quotation, "not of course ... in the modern sense of the term" suggests the distinction to be made. We must take jus gentium as international analogo sensu.⁵⁰

In concluding this consideration of international law in Rome a final word from Coleman Phillipson is enlightening: "In the international transactions of Rome", he says, "especially in her earlier period, bona fides was taken to be the fundamental principle of aequitas".⁵¹ These words sound notes in harmony with those of the present Sovereign Pontiff who has warned us on several occasions that basic trust and brotherhood of mankind are necessary foundation stones for any international order.

49 Phillipson, 1, 96.

50 Ibid., 1, 106-8.

51 Ibid., 1, 119.

As we were talking of Rome time changed its markings from "B.C." to "A.D." In fact, with the passing of Rome around 500 A.D. we find ourselves in the Middle Ages. What does this fourth and final period offer us for our historical sketch of international law?

The Middle Ages offer 1) example, 2) an indirect and 3) a direct contribution to the development of international law.

1. The Example: M. Le Fur in his fine study already quoted asks what moment we should point to as that in which was realized "cette vocation universelle de toutes les nations civilisées à un droit"? And he answers: "Pour moi, sans aucun doute, à l'apparition du christianisme".⁵² Christianity put a new twist to the late Roman period and it continued, even increased, its action into the Middle Ages. It was the basic notion of the equality of men, and therefore of states, before God; it was the grand conception of the Mystical Body which united all men and emphasized thereby the order necessary in the reciprocal relations of man-to-man and people-to-people; it was the new cast given society and man's life that made Christianity an exemplar in the field of international law, that enabled the Middle Ages to contribute directly and indirectly to the development of international law.

2. The Indirect Contribution: Indeed, "with an entirely different practical spirit ... the institutions of international law developed

52 op. cit., 281.

in the Middle Ages".⁵³ Creating this "practical spirit" were saints and scholars of the new church. "Saint Augustin est le premier à l'avoir exposée dune facon développée dans sa célèbre Cité du Dieu".⁵⁴ He traced a jus gentium in broad outline, clarifying the distinction of natural, eternal, and civil law; he touched many knotty international problems, discussing the justice of wars, slavery, and the rule of law necessary in the City of God.⁵⁵

Contemporaneous with and subsequent to Augustine were a series of Roman Pontiffs who emphasized the rule of the "double-edged sword"; who pointed to the universal spiritual authority of the Holy See and the harmony that should reign under this spiritual rule among all temporal sovereignties. -- Such was the work of an Ambrose, a Gregory the Great, an Innocent III, and a Boniface VIII.

At the same time a group of lawyers headed by Ulpian, Gratian and Bartolus, were developing the notions of Roman law, giving definition to jus gentium, clarifying the concept of jus naturale. For, Ulpian's writings were "considered as having the effect and force of statutes";⁵⁶ Gratian's Decretum was destined to preserve and enhance the contribu-

53 Korff, 255.

54 Le Fur, 286.

55 cf. Jean Koster, "Le 'Droit des Gens' chez Saint-Augustin", Revue de Droit International, XIV (1933), 31-61, 282-317, 635-676.

56 Scott, 1, 114.

tion of Isidore of Seville;⁵⁷ Bartolus was the most famous of the later Medieval commentators on Roman law.⁵⁸

Toward the end of this whole tradition we find the Angelic Doctor who would be famous if he "ne fait que préciser et développer ces grandes lignes (those of Augustine mentioned above) avec son esprit de méthode habituel".⁵⁹ It was he, who has joined the legal threads of the past into a close-woven definition of law.⁶⁰

This then is the indirect contribution of the medievalists, and especially (under the inspiration of the Church be it noted) of the medieval churchmen.

3. The Direct Contribution: Though Baron Korff cites several instances of a real codification of international law in Medieval times, ("such were the different medieval codes of maritime law, the Tables of Amalfi, the Consolato del Mare, the Venetian Code of 1255, and the laws of Visby")⁶¹ still the principal direct contribution in this field is a curious phenomenon. Prohetic of the future predominance of Spain in the development of modern international law, we find in Etymologiae of St. Isidore of Seville une definition (of international

57 Scott, 1, 204, quoting Figgis, Pol. Aspects, p. 92.

58 Ibid., 1, 248-50.

59 Le Fur, 286.

60 cf. S. Thomas, Summa Theologica, Ia II^{ae}, 90, 4, resp.: "Et sic ex, quatuor praedictis potest colligi definitio legis, quae nihil aliud est quam quaedam rationis ordinatis ad bonum commune, et ab eo qui curam communitatis habet, promulgata."

61 Korff, 256.

law) ou, pour employer un terme plus exact, une description qui se rapproche beaucoup de la conception moderne".⁶² The import of St.

Isidore's contribution is well summarized for us by the great Belgian jurist we have just quoted. He says

Dans ses Etymologiae, Isidore de Seville, ... emprunte la définition du droit introduite par Ulpian, et divise le droit en jus naturale, jus civile, et jus gentium. Il comprend dans le droit des gens, jus gentium, une série de matières qui rentrent dans notre notion actuelle d'un système de droit des gens. ... il admet même un droit militaire, jus militare.⁶³

And the subject-matter of this last named jus, Nys goes on to say, resembles the chapter headings of a modern work on war.

* * *

These are the materials, then, of the past, the deposit, as it were, of a combined Ancient, Greco-Roman, and Medieval tradition. As a summary and symbol of this historical tradition, let us paint a second scene, this time a diptych; let us write a double caption. The first picture: Christopher Columbus landing with his crew on San Salvador in the West Indies. Its caption: Discovery of the New World: the gateway to modern empire-building and world relations. The second picture: The Vatican Palaces. Its caption: Home of the Vicar of the

62 E. Nys, Le Droit International, les Principes, les Théories, les Faits, 2nd Ed., Castaigne and Fontemoing, Brussels, 1904, 50.

63 Ibid., 50.

Prince of Peace. -- The summary lies in this that Columbus' discovery focused all previous work in international law and emphasized especially the Church's continued contribution to the international field.

With the discovery of America, too, a new phase in national relations began. Vitoria was asked to pronounce on the Indo-Spanish relations in the New World. Suarez followed to unify and give philosophical foundation to the pronouncements of his Dominican contemporary. Grotius succeeded both as the popularizer of the work of the theologians.⁶⁴ And now today, as in the First World War, the pope is the guardian of order and peace among men; he is the guardian of law.

What, therefore, did Vitoria, Suarez, and Grotius, who had the role of legislators for this new era, have to say of international law? What did Benedict XV and Pius XII, who have had the role of defenders in the war-days of our century, have to say of international law?

64 J. B. Scott, Catholic Conception of International Law, Georgetown U. Press, Washington, D. C., 1934, 127 n.

CHAPTER III

THE ELEMENTS OF A DEFINITION

We can readily picture ourselves present in an imaginary conference called by Pius XII to marshall the notions requisite for a definition of international law. Seated at the head of the council table would be our present Holy Father; to his right, his predecessor, defendant of international law during World War I, Benedict XV. Ranged along the other two sides of the table we would see Francisco de Vitoria,¹ Francisco Suarez, and Hugo Grotius.² The Holy Father would call the conference to order; each individual at the table would present his views; particular points would be re-discussed; and in the end a definition and explanation thereof would be formulated. As we approach the next two chapters we might even conceive ourselves as reading the "Report of the Proceedings" of this conference, for in reality its content is just that.

Before hearing from the Dominican, Vitoria, we ask our historical advisors, James B. Scott³ and Ernest Nys⁴ to give us a little background for the speaker.

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- 1 We will use Vitoria or de Vitoria throughout in preference to the latinized form Victoria.
 - 2 Here we prefer the more common Grotius to the Dutch name, Groot.
 - 3 J. B. Scott, The Spanish Origin of International Law, Part I, Francisco de Vitoria and his Law of Nations, Carnegie Endowment for International Peace, Washington, D.C., 1934, 68-93.
 - 4 Francisco de Victoria, De Indis et de Jure Belli Relectiones, ed. by E. Nys in "Classics of International Law", Carnegie Endowment, Washington, D.C., 1917, Intro. 9-100.

A. VITORIA

Francisco presents his notions of international law, they tell us, in four works: De Indis Prior, De Indis Posterior seu de Jure Belli, De Poteste Civili, and De Jure Gentium et Naturali.⁵ As prima professor of theology at Salamanca from 1526-1546 he had delivered these lectures among many others. Ernest Nys adds that Vitoria's doctrine is especially interesting because he was the savior and revivor of scholasticism in Spain by his timely injections of Thomistic metaphysics, a doctrine he had imbibed from Petrus Bruxellis (Pierro Crochaert) one of his professors at Paris, who had styled himself Divi Thomae doctrinae interpres et propugnator accerimus.⁶

And, now, to the theologian's doctrine.

Vitoria's whole presentation could be reasoned in summary thus:

1) The State is a perfect society, but 2) the states of the world are yet interdependent. Hence 3) a law is requisite to maintain international order and 4) this law is jus gentium, taken as a law of nations.

Let us now see a verification of all this.

"Res publica proprie vocatur perfecta communitas",⁷ Vitoria says.

5 The first three named are Relectiones; the last is a commentary on the Summa of St. Thomas, II - II, 57, 3.

6 Nys, preface to Vitoria, op. cit., 20 and 66.

7 De Jure Belli, III (edition by Nys, 277).

And by a perfect society he meant what Aristotle and St. Thomas before him meant,⁸ an organized society completely equipped in itself with the means necessary to man's social and political exigencies.⁹ There are, however, many states in the world a) endowed with integrity, independence, and equality;¹⁰ b) bound together into one family of nations. These two notions Vitoria lays down as the foundation of an international community, whose legal bond is law. Dr. Verdross analyzes well this notion of unity showing at the same time its connection with a universal law as well as its ultimate foundation.

la base de cette science nouvelle est la conviction de l'unité morale du genre humain, présente déjà dans l'antiquité, mais affirmée d'un façon nette seulement par le christianisme. Pour celui-ci, la fraternité de tous les hommes n'est qu'une conséquence du monothéisme. Car si les êtres humains dépendent du même Dieu, ils ont tous une base commune qui les unit en une société humaine universelle. ... Vers la fin de cette époque (Moyen Age), l'idée universaliste se purifia ... Ainsi naquit dans l'esprit de Francois de Vitoria ... l'idée d'un droit strictement universel, c'est-à-dire, d'un droit liant non seulement les Etats chrétiens entre eux, mais tous les Etats de l'humanité.

Car ... justice internationale n'est pas réservée à la chrétienté seule. ...¹¹

And why? Because this brotherhood is based on the fact that men "ont en Dieu le même père".¹¹

8 S. Thomas, In Octo Libros Politicorum Aristotelis, Laval University, Quebec, 1940, Lectio I.

9 Scott, Catholic Conception, 66.

10 De Indis, II (ed. by Nys, 244); cf. also Scott, Spanish Origin, 137 and 281.

11 A. Verdross, "Droit International de la Paix", Recueil des Cours, 1929, 30, 277-8.

From what has been said we conclude with Vitoria that as persons are formed into a civitas civilis and bound under civil law, so too this family of nations is a unity and must be bound by an international law.¹² Whence the question arises: what is this international law of Vitoria? Vitoria replies, "quod naturalis ratio inter omnes gentes constituit, vocatur jus gentium".¹³

International law is jus gentium, then. But as Nys well observes, Vitoria is here merely quoting the Institutes of Justinian and that rather poorly since he inserts the word gentes for the word homines which his authority used. Did Vitoria quote roughly from memory or was this change a deliberate one? Again, following the Belgian jurist, we have only to quote the very next sentence of the De Indis, which begins "sic enim apud omnes nationes...",¹⁴ to show Vitoria's mind.¹⁴ Gentes for Vitoria was not an ambiguous synonym for the homines of Justinian's original. It meant what the context clearly shows it to mean, nationes. Hence, the Spanish Dominican is here giving us a law which is the measure of the dealings between states or nations as such.¹⁵

This jus gentium, however, we have seen to be variously interpreted by both ancient and medieval writers. In what sense, then, we

12 De Indis, III, 2 (ed. by Nys, 257).

13 De Indis, III, 2 (ed. by Nys, 257).

14 Nys' interpretation on this point as seen in the "Introduction" to his edition of Vitoria is the accepted one.

15 Verdross, op. cit., 278-9.

ask, did Vitoria use the term jus gentium? Was it natural law for him or was it positive law? And, if the latter, what kind of positive law was jus gentium?

Now, natural law for Vitoria was that dictamen rectae rationis which he found in his texts, Thomas and Aristotle. Indeed, from a commentary on a fragment of the II-II, 57, 3 of the Summa Theologica we see that Vitoria accepts the Angelic Doctor's definition of natural law and proceeds immediately to comment on its relation to jus gentium.¹⁶ And how are these two related?

"... We say with St. Thomas that the natural law is an absolute good, and not a relative good; but the jus gentium is only relatively good, therefore it is said that the jus gentium is not equity of itself from its own nature, but was established as inviolable, from agreement among men. And so I answer the principal doubt with this conclusion: that jus gentium ought to be placed more under positive law than under natural law".¹⁷

Jus gentium, then, for Vitoria, was not that of the Jurisconsults who took the term in too wide a sense, but rather it harkens back to Isidore of Seville and his definition of jus gentium in Book V of the Etymologiae, on which Suarez comments:

Unde inferius, c. 5 post exempla juris gentium
(Isidorus) concludit inde jus gentium vocari quod eo

16 De Jure G. et Nat. cxi; cf. also Spanish Origin, 165-6; 168-9.

17 Ibid., cxii; for further proof that Vitoria distinguishes natural law and jus gentium cf. De Indis Sect. II and III passim; De Jure Belli, passim; De Jure G. et Nat., Append. E, cxii-cxiii; cf. also Spanish Origin, esp. 166-72.

jure omnes fere gentes utuntur. In quo insinuat definitionem juris gentium scilicet, esse jus commune omnium gentium non instinctu solius naturae, sed unu earum constitutum.¹⁸

Further, jus gentium for Vitoria belongs more to positive law than to natural law. But to what sort of positive law?

"... jus gentium is two-fold, just as positive law is two-fold ... There is one kind of positive law taken from private agreement and consensus, and another kind taken from public agreement. In like manner we say of the jus gentium that a certain kind of jus gentium is from the common consensus of all peoples and nations ..."¹⁹

Jus gentium is, then, principally a positive law whose derivation is two-fold: first, from natural law since "vel est jus naturale vel derivatur ex jure naturali";¹⁹ and, secondly, from consensus since, for those things which come under jus gentium, "consuetudo potest dare facultatem et auctoritatem ..."²⁰ It is worthy of note, too, that this very consensus, whence jus gentium is partially derived, is in turn based on the natural law. For

n' est donc pas un droit imposé par une autorité monarchique aux princes subordonnés, mais un droit introduit sur la base du droit naturel par le consentement général des nations dans l'interet du bien commun.²¹

18 F. Suarez, De Legibus ac Deo Legislatore, Vives, Paris, 1856, II, 19, 6; cf. Scott, Law, the State, and the International Community, Columbia U. Press, New York, 1939, I, 198-200. Also, E. Nys, De Droit des Gens et les Anciens Jurisconsultes Espagnols, Nijhoff, The Hague, 1914-54.

19 De Indis, III, 2.

20 De Jure Belli, 9.

21 Verdross, 279.

The last four words of M. Verdross' statement lead us to a final consideration, the obligation of Vitorian jus gentium. Two statements from the Dominican theologian himself will sufficiently clarify this point. The first from the De Indis

et quidem multa hic videntur procedere ex jure gentium, quod, quia derivatur sufficienter ex jure naturali, manifestam vim habet ad dandum jus et obligandum. Et, dato quod non semper derivetur ex jure naturali satis esse videtur consensus majoris partis totius orbis, maxime pro bono communi omnium.²²

The second statement is from the De Potestate Civili.

International law has not only the force of a pact and agreement among men, but also the force of law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter being established by the authority of the whole world.²³

An analysis of the first statement yields the following conclusions:

- 1) Jus gentium, derived from natural law, takes its binding force from that same law;²⁴
- 2) Jus gentium, not derived from the natural law, takes its binding force from consensus, inasmuch as a majority consent is directed to the common good.

²² De Indis, III, 7.

²³ De Potestate Civili in Scott, Spanish Origin, xc.

²⁴ Scott, Spanish Origin, 140.

A consideration of the second statement yields two other conclusions, namely: 3) Jus gentium has the force of law; 4) Jus gentium has the force of a pact and agreement among men.

The conclusions are similar. They all bespeak that bonum commune which is the core of obligation as found in St. Thomas' general definition of law.²⁵ One either reduces the obligation directly to that of the natural law, or

"Si donc on soutient que les Etats sont obligés par le consentement général, on présuppose déjà un principe d'ordre supérieur qui oblige les membres de la communauté internationale à se conformer aux règles créées par la volonté commune. Cette règle est le principe qui, la parole donnée, doit être tenu. Ce principe: pacta sunt servanda ... Cette règle est un principe du droit naturel ..."²⁶

Consequently, the laws of consensus find their obligation reductive in the natural law.

The above statements, however, bring up some interesting points which have been implicit in most of our previous discussion. They concern types of international law in Vitoria. By way of conclusion, let us bring some of these out.

Vitoria admits international law, jus gentium for him, is fundamentally dual: "vel est jus naturale vel derivatur ex jure naturali."²⁷ That is, inasmuch as jus gentium is identified with jus naturale

25 S. Thomas, Summa Theol., I-II, 90, 2.

26 A. Verdross, "Le Fondement du Droit International", Recueil de Cours, 1927, 16, 256.

27 De Indis, III, 2

Vitoria affirms a natural international law;²⁸ inasmuch as it is a derivative of natural law, he affirms a positive international law. Further, with equal clarity, Vitoria has said that jus gentium pertains more to positive than to natural law, that it pertains to human positive rather than divine positive law. He implies, too, that this law is generally an unwritten (as opposed to written) law²⁹ which obtains by the consent, at least, "majoris partis totius orbis".³⁰ True, it could also happen, as Vitoria implies, that pacts or agreements could be made between just two states or a few states. But then, although freely entered into, although these pacts would bind,³² still the pact itself would only be law in an analogous sense. It would not, de facto, be imposed by some superior or an inferior, but would rather partake of the nature of a bi-lateral or multi-lateral contract freely entered into by the parties. This, of course, does not deny the binding force of such agreements as based on the natural law. Such, indeed, is the basis of

28 cf. supra, notes 13, 17, 18, 22, 23. Also to the point are the words of Verdross, "mais outre ce droit des gens naturel, il (Vitoria) connaît également un droit des gens positif". ("Droit de la Paix", 279).

29 "But there is a doubt whether it may be a sin to violate jus gentium (to which some have not yet given their sanction), that is to say, to violate the law of nations which is unwritten, or even written..." (Scott, Spanish Origin, Append. E, cxii).

30 cf. supra, note 22.

31 cf. De Indis, III, 9; also Scott, Spanish Origin, Append. E., cxiii-cxiv.

32 De Pot. Civili, xc in Scott, Spanish Origin.

We might distinguish with Verdross, "mais outre ce droit des gens naturel, il (Vitoria) connaît également un droit des gens positif". ("Droit de la Paix", 279), but this terminology would only confuse the distinction we are trying to establish.

obligation in any contract. It merely emphasizes a point to be considered more thoroughly later, the fact of an analogous international law consequent on agreements of two or a few states.³³

Thus far then the ideas of the Spanish Dominican. We turn now to the "Report" as it were, of his Jesuit compatriot, Francisco Suarez.

B. SUAREZ

Two years after the death of Vitoria, in the year 1548, Francisco Suarez was born. He turned to the Society of Jesus about the time of its ruby jubilee. Like Vitoria, he was in the Thomistic tradition, having himself studied at Salamanca where the Spanish Dominican had introduced St. Thomas' theology and philosophy.³⁴ Like Vitoria, Suarez taught in Italy (Rome) before returning to Spain to take up his life's work. Like Vitoria, also, Suarez became a prima professor, but held his chair at the University of Coimbra, the Portugese counterpart of Spain's Salamanca.³⁵

It was in this capacity that Suarez wrote the work which especially has merited for him a place among international jurists, that is, the De Legibus ac Deo Legislatore. If we added to this two-volume work Suarez's chapter on war (in the tractate De Triplici Virtute) and the

33 Scott, Spanish Origin, in De Jure Gentium et Nat., cxiii.

34 Scott, Catholic Conception, 129.

35 Scott, Spanish Origin, 72.

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Errores, we would have the Jesuit's complete contribution to law.³⁶

The treaties on Law, however, especially the last few chapters of the Second Book, will occupy us in our quest for the Suarezian contribution to international law. What, then, is this contribution?

The philosophy of international law is, in a word, Suarez's contribution. As James B. Scott notes: "This philosophy was the contribution of Suarez, although it may not have been his conscious purpose to complete theoretically what Vitoria had begun practically".³⁷

"Philosophy of international law", such a contribution would seem to consist of four elements.

1. Philosophy: This would imply a reasoned statement which would carry us to the ultimate causes of the state, law and especially international law. It is interesting to note that in his "Proemium"³⁸ Suarez, like Vitoria,³⁹ justifies a theologian's treating this ... His argument might be summarized in the boast of a great Medievalist that the scope of the theologian was "de omni re scibili et quibusdam aliis".

36 Scott, Catholic Conception, 131.

37 Ibid., 129.

38 De Legibus, ix-xi.

39 De Indis, I, 2.

2. International: What would the ultimates of an international philosophy be? Surely it should be shown that there are or could be nations or states. Secondly, supposing the first statement proved, the nature of these nations or states should be clarified. Finally, having posited these two premises, the questions of whether there are inter-relations between these states and, if so, of what sort these relations are, should be answered.

In answering the first two points we might repeat Dr. Scott's words: "It will shorten matters here to say that in general the view of Suarez concerning the State are those of Vitoria".⁴⁰

Justum est et humanae naturae valde consentaneum haberi magistratum civilem cum potestate temporali ... Et ratio est, quia cum homo sit animal sociale, requiritur in communitate sive oeconomica, sive politica, aliqua potestas ad quam spectet illum regimen ... (et) illud confirmat universalis hominum consuetudo".⁴¹

In the best Aristotelian scholastic tradition, Suarez would postulate a society ratione naturae, which would bring with it a temporal power regulatory of this society. Finally, not only could such states exist, but they do as "universalis hominum consuetudo" demonstrates.⁴² It should be noted, too, what type of society Suarez conceived to be thus formed. For "communitas" can be variously distinguished. First, into

40 Scott, Law, the State, and the International Community, I, 561.

41 F. Noel, Theologiae Fr. Suarez Summa seu Compendium, from Bibliotheca Cleri Universa, Garnier and Migne, Paris, 1877, I, 633.

42 cf. Scott, Catholic Conception, 241.

a natural community "cujus modi est communitas humani generis";⁴³ and a "communitas politica vel mystica".⁴³ This latter in turn can be divided into a society "jure ... divino, eo quod ab ipso Deo instituto sit", and a political society of human origin. Such human societies, however, are either imperfect, as the family, or perfect "quae est capax politicae gubernationis, quae, quatenus talis est dicitur sufficiens in hoc ordine; quomodo dixit Aristotelis ... et D. Thomas ... civitatem (the state) esse communitatem perfectam".⁴⁴

Hence, there is a state and it is a perfect society, consequent on the exigencies of human nature. What, then, of an international society? Let us complete the last quotation and see. Suarez was saying "civitatem esse communitatem perfectam"⁴⁴ and he adds "et a fortiori regnum, et quaelibet alia superior congregatio, seu communitas, cujus pars civitas sit, erit communitas perfecta".⁴⁵

The basis of this greater society is the same for Suarez as for Vitoria. Dr. Verdross paraphrasing the Jesuit theologian has stated it well in connection with the question of the law of nations.

La raison d' être du droit des gens ... c'est que le genre humain, bien qu' il soit divisé en nations et en royaumes différents, constitue cependant une certaine unité, non seulement spécifique (c'est-à-dire anthropologique), mais aussi politique et morale qui résulte du précepte naturel de l'amour et de la charité mutuelle qui doivent s'entendre à tous ...⁴⁶

43 De Leg. I, 6, 18.

44 Ibid., I, 6, 19.

45 Italics are mine.

46 Verdross, Droit de la Paix, 280.

The family of nations, then, is a political community, because its members, the States, are political; it is a social community, because man is a social animal; it is a moral community because man's activity is measured in terms of a moral law.⁴⁷ From all this Suarez concludes:

Quapropter licet quaecumque civitas perfecta, respublica, aut regnum, sit in se communitas perfecta, et suis membris constans, nihilominus quaelibet illarum est etiam membrum aliquo modo hujus universi, prout ad genus humanum spectat: nunquam enim illae communitates adeo sint sibi sufficientes sigillatim, quin indigeant aliquo mutuo juvamine, et societate, ac communicatione, interdum ad melius esse majoremque utilitatem, interdum vero etiam ob moralem necessitatem et indigentiam, ut ex ipso usu constat.⁴⁸

3. Law: The third element of the Suarezian contribution is "law". In general, we can say Suarez is again in the Thomistic tradition since his final definition of law is that of St. Thomas cited before. Summarized somewhat schematically for emphasis, the notions of Suarez on law would read as follows:

Law, in general, can be viewed either according to its constitutive parts or according to its qualities:

A. The constitutive parts, in turn, are either internal or external.

1. Internally, we have the essence of the law, that

47 Scott, Catholic Conception, 182.

48 De Legibus, II, 19, 9. Note: James B. Scott in his work on the Catholic Conception of International Law is ever pausing to compare the views of Suarez and Vitoria. His observations on their divergent views of the international community are interesting. Suarez, he says, created an international community with law, whereas Vitoria's community was endowed with the power to create law and to punish the violations of that law. (cf. Cath. Conception,

which constitutes in its proper species this particular product of the intellect and will as directive of human conduct. -- This essence might be broken down into matter and form (somewhat analogous to the matter and form of physical substances). Then the matter, materia circa quam in this case, would be human acts and the form, the ordination of the legislator.

2. Externally, we have:

- a. the final cause of law, which directs acts to the common good of the society or community;
- b. and the efficient cause, which is the legislator, the one entrusted with the care of this society.

B. The qualities, on the other hand, wherewith a law should be endowed. They are two-fold: that the law

1. Should be just, and this with regard

- a. to the method of legislation (juste feratur). This looks both
 - 1) to the legislator -- that he enact justly and
 - 2) to the law itself -- that it be in accord with distributive, commutative, and legal justice;
- b. to the matter (ut justa feratur).

2. Should be perpetual (tum a parte legem ferentis, tum subordinatorum, tum materiae legis). All of which implies a perpetuity a parte post, secundum quid, negative.⁴⁹

All this leads us to a consideration of the last element in Suarez's contribution to international legal science.

184 ff). Elsewhere the Doctor notes "the international community of Suarez (is) ... inorganic;" Vitoria's, however, is "an organic community". (cf. Law, State and International Community, 559). -- This is especially important for us since the same authority points out that besides the chief exception, i.e. the international community, the international ideas of Suarez and Vitoria are similar.

⁴⁹ De Legibus, cf. Book I, passim, for this general treatment.

4. International Law: This union of the second and third elements is the most important for us. Suarez shows, first, the fact of an international law. For, continuing the line of reasoning we quoted above from II, 19, 9 he says:

Hac ergo ratione indigent aliquo jure quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem; non tamen sufficienter et immediate quoad omnia: ideoque aliqua specialia jura potuerunt usu eorundem gentium introduci.⁵⁰

But, we ask, what law fulfills this mission? Suarez continues

Nam sicut in una civitate vel provincia consuetudo introducit jus, ita in universo humano genere potuerunt jura gentium moribus introduci. Eo vel maxime quod ea ad hoc jus pertinent, et pauca sunt, et jure naturali valde propinqua, et quae facillimam habent ab illo deductionem, adeoque utilem et consentaneam ipsi naturae, ut licet non sit evidens deductio tanquam de se omnino necessaria ad honestatem morum, sit tamen valde conveniens naturae et de se acceptabilis ab omnibus.⁵¹

In sum, then, Suarez's argument runs like this so far. Given the unifying basis of human nature, it follows that nations are related. And more, that they are members of a universal society, is consequent on their insufficiency and their need of mutual assistance. Now, to govern their reciprocal relations a system of law is necessary and, finally, nature and custom have established such laws in jus naturale

50 Ibid., II, 19, 9.

51 De Legibus, II, 19, 9.

and jus gentium.

Now, since natural law is "illa quae humanae menti insidet ad discernendum honestum a turpe"⁵² it binds men whether they act singly or collectively and, hence, there can rightly be said to be an international natural law, which "magna ex parte"⁵³ covers international relations. (Here, of course, Suarez is but following a conception of natural law which we have already noted in Vitoria's work and which is somewhat verified in St. Thomas.)⁵⁴ And yet it is clear that this law is insufficient for immediate application to given cases and so Suarez rightly postulates a more refined notion in international law as represented by the term jus gentium. And this jus gentium is ...?

52 Noel, 613.

53 De Leg. II, 19, 9.

54 I say "somewhat" because the Angelic Doctor does not use the term natural law univocally. Therefore, it might be useful to clarify here both Thomas' concept of and his distinctions of natural law from jus gentium. For him, jus naturale, when divided according to its comprehension, is tripartite (In Sent. IV, 33, 1 ad 4): 1) there is the natural law which is dictated by nature (when nature is taken as distinguished from reason). 2) there is the natural law which is inclusive of the divine law and "quod ... in Evangelio continetur". And, 3) there is the natural law which is the dictate of man's reason. Now, the second of these meanings is very broad and of no application to us. The first and third, however, do apply, for in these St. Thomas distinguishes natural law sensu lato from natural law sensu stricto. Whence it becomes clear how Thomas admits of various types of jus gentium. For according to the first meaning we have natural law as common to men and animals alike and, hence, from this concept jus gentium is obviously distinct. For the law of nations views man under the special aspect of social animal (I-II, 95, 4, c.). On the other hand, if natural law is understood in the third sense, jus gentium will only be distinguished from jus naturale as an immediate conclusion from its premis (I-II, 95, 4, c.).

First, the theologian notes that the jus we speak of here is a ⁵⁵
jus in the sense of law and not in the sense of a moral faculty.

Secondly, this jus gentium is not that of the jurists, of some theologians, or of certain "aliqui". Like Vitoria before him, Suarez will not admit that jus gentium differs from the natural law in the sense that the latter is common to man and beast, while the former is proper to man alone. For it is absurd to talk of a natural law which is founded in sensitive nature.⁵⁶ Perhaps, then, the distinction will be admitted to the theologians who grant intrinsic necessity to jus gentium and then distinguish "quia jus natuale sine discursu vel facillimo discursu (quis) innotescit; jus autem gentium per plures illationes et difficiliores colligitur".⁵⁷ Suarez rejects this by recalling what he has already proved about the natural law. For all first principles of the moral law and their necessary conclusions pertain especially to natural law.⁵⁷ A third opinion Suarez rejects as being founded on the false distinction which facts contradict. This distinction holds the conclusions of natural law as absolute, nulla societate supposita, whereas the precepts of jus gentium are contingent on a social order.⁵⁸ -- Suarez, then, concludes

55 De Leg. II, 17, 2.

56 Ibid., II, 17, 3-7.

57 Ibid., II, 17, 8.

58 Ibid., II, 17, 9.

Ergo ut jus gentium a naturali distinguatur, necesse est ut, etiam supposita tali materia, non sequitur per evidentem consequentiam sed per aliquam minus certam, ita ut arbitrium humanum et moralis commoditas potius quam necessitas intercedat.⁵⁹

Are we, then, to think of jus gentium as only permissive or concessive? Suarez forestalls this objection in Chapter 18. He, first, notes that those who would deny that jus gentium can command or prohibit, are really mixing the notion of jus as law and jus as a facultas moralis.⁶⁰ He lays as a first premise, the fact that prohibitive (or prescriptive) law cannot be separated from jus concessivum. And yet (his second premise) if the latter is under jus gentium, then the former is under the same law. Hence, putting these ideas together, it follows that "eo ipso quod uni conceditur, praecipitur aliis ..."⁶¹

Following this parenthesis, Suarez returns to his main line of argument. If jus gentium, he seems to say, is not natural law, then it must be positive law. Again he is building on foundations already established.⁶² For although jus gentium does agree with natural law in many points, (both apply to men, the matter of both is prescriptive as well as concessive, prohibitive as well as permissive),⁶³ yet they are really different. And these points bring out the difference: In its affirma-

59 Ibid., II, 17, 9.

60 Ibid., II, 18, 1 and 2.

61 Ibid., II, 18, 5.

62 Ibid., I, 3.

63 Ibid., II, 19, 1.

tive and negative precepts

"non est jus gentium tantum ostensivum, malitiae sed constitutivum: itaque non prohibet mala, quia mala sunt, sed prohibendo facit mala. Hae autem sunt propriae et quasi essentiales differentiae legis: ergo ita differunt jus gentium et naturale".⁶⁴

Whence, arise other differences. The natural law is immutable; jus gentium is not. The natural law is of universal application, both as to time and place; jus gentium is not so universal.⁶⁵

Hence, Suarez concludes, jus gentium is positive law and also human law. -- The basis for this conclusion is again found in an earlier commentary on St. Thomas, I-II, 95, 4. -- For ratione originis law is divided into natural and positive law; ratione causae efficientis it is divided into human and divine. Both divisions involve contradictories.

Sed ostensum est legem juris gentium non esse naturalem propriis et in rigore et consequenter non esse divinam: ergo necesse est ut sit positiva et humana.⁶⁶

This logic, however, brings the Spanish Jesuit athwart a new problem. Jus civile, civil law, is also positive and human. Wherein, then, does jus gentium differ from it? The answer seems simple: civil law pertains to one state; jus gentium, however, is applicable to all states and peoples. But following an argument of St. Thomas in the Politics,⁶⁷ Suarez himself objects to this distinction as pertaining to the extension

64 Ibid., II, 19, 2.

65 Ibid., II, 19, 2.

66 Ibid., II, 19, 4.

67 S. Thomas, Politicorum, Lect. I.

and not the comprehension of jus civile and gentium. It is evident that a distinction "secundum majus et minus" is only accidental.⁶⁸ -- Suarez, therefore, proceeds to distinguish the two laws.

Human law is two-fold: 1) written and 2) un-written. (A distinction already established). Unwritten law, as is clear, is inaugurated by custom, consuetudine; and jus gentium is established by custom, common practice, and consent among the nations, "et ita in hoc differe ab omni jure civili scripto".⁶⁹ If, however, there is a law established by practice in one nation, it applies only to that nation and "dicitur etiam civile".⁷⁰ Thus, the whole problem is resolved and Suarez sums up

Si vero introductum sit moribus omnium gentium, et omnes obligat, hac credimus esse jus gentium proprium, quod differat a naturali, quia non naturae sed moribus nititur, et a civili etiam distinguitur in origine, fundamento, et universalitate, modo explicato.⁷¹

We said the explanation of jus gentium seemed complete but to Suarez, as we see from this last quotation, everything is not yet settled. The phrase, "omnes obligat" is tell-tale. It is fine to say jus gentium is a true law and to distinguish it from other laws, but we would like to check on these statements. Obligation, Suarez holds, is the proximate and adequate effect of law.⁷² Arguing, then, from effect to cause, we can say that, if jus gentium binds, it must be a true law.

68 De Leg., II, 19, 5.

69 Ibid., II, 19, 6.

70 Ibid., II, 19, 6.

71 Ibid., II, 19, 6.

72 Ibid., I, 14; cf. supra p. 16.

That the yoke of natural law is always and everywhere binding on all peoples we assume here as admitted, and, hence, pass on immediately to jus gentium.

The obligatory force of jus gentium springs from two sources. The first is indirect, the natural law. The second is direct, consuetudo itself. To show the first point an example from Suarez will be helpful. Receiving ambassadors and recognizing their inviolability is the accepted practice of nations, Suarez states. (And this is true even granting that there is no necessity under the natural law that nations admit legates; even granting that a refusal of legates would be a violation of jus gentium, according to Suarez.) It follows from this that once ambassadors are admitted in accord with the established practice "contra jus naturale sit non servare illis immunitatem, quia est contra justitiam et debitam fidelitatem".⁷³ This is the point Verdross was making when he said

cet dernier (droit des gens) créé par le consentement universel ou quasi universel que lui accordent les peuples, est fondé sur le droit naturel, à savoir sur le principe de la fidélité à ce qu' on a promis, c'est-à-dire sur la règle 'pacta sunt servanda'.⁷⁴

The second font of obligation for jus gentium is, as we said, consuetudo itself. This obligation has two roots. Suarez himself

73 Ibid., II, 19, 7.

74 Verdross, Droit de la Paix, 284.

demonstrates the first by another example showing that treaties and international agreements are, indeed, binding once they are made (and that potius pertinet ad jus naturale⁷⁵) but further insisting that the choice of making or not making such pacts, over and above the dictates of reason, "tamen usu ipso et jure gentium videtur majus (esse) firmatum ..."⁷⁶ Jus gentium, therefore, has a binding force all its own. All of which brings us right back to Section II, 19, 9 from which we quoted so copiously above. For, whence is this binding force of jus gentium? It follows from the fact of the unity of humanity which in turn creates the basis for the family of nations. And this family in its turn needs, over and above the natural law,

specialia jura ... juri naturali valde propinqua et quae facillimam habent ab illo deductionem, adeoque utilem et consentaneam ipsi naturae, ut licet non sit evidens deductio tanquam de se omnino necessaria ad honestatem morum, sit tamen valde conveniens naturae et de se acceptabilis ab omnibus.⁷⁷

The second root of the obligation of consuetudo taps the very notion of custom. By definition, consuetudo according to Suarez, is "jus quoddam moribus institutum, quod pro lege suscipitur cum deficit lex".⁷⁸ Now, in essence, jus gentium is consuetudo, Suarez maintains. Hence, since custom induces an obligation, it follows that jus gentium itself

75 De Legibus, II, 19, 8.

76 Ibid.

77 Ibid., II, 19, 9.

78 Ibid., VII, 1, 1.

is binding. For the proof of the major premise Suarez shows the definition of Isidore "in rigore competere juri gentium".⁷⁹ The minor, on the contrary, is established by a double argument. 1) Only a perfect community, Suarez insists, can establish a custom. Whence it follows, as he implies, that whenever such a community by concerted action sets up a custom, it is expressing its mind which in the given case is endowed with legislative power.⁸⁰ 2) Consuetudo itself partakes of "omnia necessaria ad praeceptum et legem ferendam ... scilicet materia proportionata, potestas, et voluntas sufficienter exterius significata ...".⁸¹ The matter is reasonable in the case in point; the power is that of the perfect society; the will is manifest by the continued action involved in establishing a custom.⁸² -- Hence, the original proof stands unimpaired.

By way of conclusion we can sum up under three points. The first is that Suarez makes a fundamental distinction between natural and positive international law. The second, a corollary of the arguments on obligation, is that jus gentium, the proper name for positive international law, is a true law and, as true, partakes of justice and

79 Ibid., VII, 3, 7.

80 Ibid., VII, 9, 6.

81 Ibid., VII, 14, 3.

82 Ibid., VII, 14, 3-6. It is interesting to note that Suarez holds, proportionate to the material, the law binds sub grave. This recalls Vitoria's assertion in De Pot. Civili that the same law binds under mortal sin.

equity.⁸³ Hence, "in juris gentium praeceptis servandam esse aequitatem et justitiam (sequitur)."⁸⁴ Thirdly, the notes of jus gentium, defined by Suarez as "jus quod omnes populi et gentes variae inter se servare debent", would be: positive, human, unwritten. In a word, Suarez speaks of a natural-positive international law.

With this, we turn to the report of the third member of the Spanish school of international law, Hugo Grotius.

C. GROTIIUS

Vitoria was a moral theologian applying principles to international Indo-Spanish relations; he is the expounder of international law. Suarez was a philosopher-jurist driving down to the ultimate in founding international law; he is its philosopher. Grotius, was a lawyer at the bar who drew on precedent; he is the compiler and popularizer of international law.⁸⁵ Grotius, "father of international law", has often been heard. The more accurate estimate of the Dutch jurist's work would be his own, the one we have just suggested.⁸⁶ For, as John Eppstein well observes, Grotius drew heavily on the past and, though a Protestant, he drew heavily on the theologians of the Church.⁸⁷

Hugo de Groot, better known under his latinized name, Hugo Grotius,

83 De Leg. I, II.

84 Ibid., II, 20, 3.

85 Scott, Catholic Conception, 127.

86 H. Grotius, De Jure Belli ac Pacis, Libri Tres, in "Classics of International Law", Oxford, 1925, Proleg., 1.

87 Eppstein, Catholic Tradition, 99 and 291.

was born in 1583. He was beginning when Suarez was reaching his peak. He will be at his best about the time of the Jesuit's death, 1617. Having tried all learning as his field, Grotius finally took his place at the bar about the turn of the century.

When Grotius was 21, in 1604, a Dutch East India merchant vessel captured the Portuguese galleon "Catharina". From this circumstance arose the fame of Grotius as international advocate and author.⁸⁸ At the behest of the East India Company young Grotius prepared a brief for the case, which came to the world's knowledge in 1864 when it was discovered and edited by the author's alma mater, the University of Leyden. The work was the De Jure Praedae. According to Professor Fruin, whose study En onnitgegeven werk van Hugo de Groot,⁸⁹ is the accepted classic on the point, the De Jure Praedae is an initial model edition of what the De Jure Belli ac Pacis would be. Further, Fruin's monograph substantiated the fact that the Mare Liberum, Grotius' only other considerable work in the international field, is nothing more than Chapter 12 of De Jure Praedae under separate cover.

As we seek, then, Grotius' notion of international law, we can safely limit our investigation to the final and more mature work of the Dutch lawyer, De Jure Belli ac Pacis, for in it we have the other two works

88 Scott, Law, State, and Int. Com., 521-2 and 524-5.

89 Translated as "An Unpublished Work of Hugo Grotius", in Bibliotheca Visserana, Vol. V.

and more.

Now, Van Vollenhoven, a well-known authority in the history of Netherland international law, has observed that

"We so often read high eulogies bestowed on the book of 1625 in vague and general terms, and so seldom concrete characterizations of it ..."⁹⁰

The historian then draws up four points which indicate Grotius' contribution.

(1) ... the book judged the conduct of nations among each other as it judged the conduct of individuals, of men.

(2) ... Grotius' books ... tended toward bringing lawlessness to an end over all the world. -- Technically this second quality of the book implies that it by no means exclusively deals with what we call international law.

(3) ... Grotius extended his rules to all nations and tribes of the earth.

(4) It is especially Grotius' fourth doctrine, however, which revealed his knowledge of human nature ... (He) did not tire of advocating one simple and yet most exacting rule, a duty of altruism and charity between nations.⁹¹

Hence, although we will expect to find much material not to our purpose, we can still study the De Jure Belli ac Pacis to verify Van Vollenhoven's last two points.

Our etymological definition of international law called this law a rule of the inter-relations of nations. Does Grotius study anything

90 "Grotius and Geneva", in Bibliotheca Visserana, VI, 12.

91 Ibid., 13-15.

that comes under this wide explanation? At the very outset he tells us he is to speak about "jus illud quod inter populos plures aut populorum rectores intercedit ..."⁹² And what is the name of this law? It is jus gentium "ut quod gentibus tantum prospicit".⁹³ For Dr. Verdross, supporting our conclusion as well as indicating the historical sequence, says:

... le droit "inter gentes" est le droit de la communauté internationale ... Cette conception du droit international n'est donc que le dernier fruit de la grande pensée universaliste du Moyen Age ..., non seulement Victoria et Suarez, mais aussi Grotius.⁹⁴

Such a notion, of course, implies two main considerations: 1) The notions of the state and of law; 2) The special nature of this jus gentium.

Taking these considerations in turn we should find in examining them sufficient knowledge of Grotius' international law.

1. First Consideration: Grotius' notion of the "state" is that of Aristotle, an autonomous society possessing civil power and sovereignty.⁹⁵ Further, if we are speaking of those things which the state can do under jus gentium (e.g., a declaration of war) that state must be a perfect society, "qui summam potestatem habeat in civitate".⁹⁶

92 De Jure Belli ac Pacis, Prol., 1.

93 Ibid., III, 3, 12.

94 Verdross, Fondement du Droit Int., 255.

95 De Jure Belli ac Pacis, I, 3, 6-7; also II, 5, 23.

96 Ibid., I, 3, 4.

The notion of Grotius on "law" is three-fold. It may be identified with that which is right or just;⁹⁷ it may be identified with jus under the aspect of a moral faculty;⁹⁸ or lastly, and this is Grotius' strict meaning, it may be a "regula actuum moralium obligans ad id quod rectum est".⁹⁹ -- Thus, briefly, we can consider the first part of our examination of Grotius complete.

2. Second Consideration: We turn, now to examine jus gentium. Jus has many divisions. It can best be divided according to Grotius, with Aristotle into natural and volitional law.¹⁰¹ The former is unique as we shall see. The latter, however, admits a further distinction ratione causae efficientis into human and divine.¹⁰² Now, divine volitional law is either universal or particular,¹⁰³ while human volitional law has a tripartite aspect: "est ... vel civile, vel latius patens, vel arctius".¹⁰⁴ The civil law applies to the state; the jus arctius patens is that of some imperfect society included in the state, such as the family; the jus latius patens is "jus gentium; id est quod gentium omnium vel multarum voluntate vim obligandi accepit".¹⁰⁵

Now, in the very next sentence Grotius adds "Multarum addidi, quia

97 Ibid., I, 3.

98 Ibid., I, 1, 4.

99 Ibid., I, 1, 9, 1.

100 N.B., jus is henceforth used in Grotius' sense of law.

101 De Jure Belli ac Pacis, I, 1, 9, 2.

102 Ibid., I, 1, 13.

103 Ibid., I, 1, 15.

104 Ibid., I, 1, 14.

105 Ibid.

vix ullum jus reperitur extra jus naturale, quod ipsum quoque gentium dici solet, omnibus gentibus commune".¹⁰⁶

Two things should be noted here. First, the "multarum addidi". This is especially interesting since Suarez and Vitoria both emphasized the same point. But more of this later. Secondly, Grotius points out for us that, although frequently confused, his jus gentium is not natural law. We ask, immediately, in what precisely are they different? The question is innocent enough but the answer involves an historical problem as well as discussion among the authorities.

Briefly, the problem is this: Professor Fruin, James B. Scott and other men of repute hold that Grotius advanced a consistent doctrine throughout his life, from the De Jure Praedae and the Mare Liberum through to the De Jure Belli ac Pacis. For them, the notions in the book of 1625 are those of the works of 1608 and 1604. Jean Kisters, on the other hand, an authority whose especial work Les Fondements du Droit des Gens¹⁰⁷ is cited in the bibliography of almost every author appearing in the 66-volume Recueil des Cours, holds the contrary opinion. For him, the doctrine of 1625 is substantially different from that of 1608 or 1604.

Now, the solution of this dilemma is neither to our purpose nor possible without lengthy digression. Suffice it to say that Fruin and

106 Ibid.

107 In Bibliotheca Visserana, Vol. V.

followers hold to Grotius' notion of jus gentium as in the De Jure Belli ac Pacis and this Kusters holds, too. The point at issue, then, is the evolution of this notion. Hence, if we explain Kusters' "evolution" theory and, then, the jus gentium of 1625 we will have satisfied all parties.

Jean Kusters states that in the De Jure Praedae, Grotius was a follower of Ulpian and his distinction of natural and international law (jus gentium): Grotius se range parmi les partisans de la doctrine d'Ulpian.¹⁰⁸

Whence does he derive this conclusion? He learns this from an exposition of Grotius' notions of the two laws as seen in the 1604 work. Here, Grotius maintained that God is the source of law and that His will was manifested in His creatures. Here, then, we find the law of nature whose first rule is self-preservation; whose second is to procure and secure the necessary means thereto. "Tel est le droit naturel (primaire), jus naturae (primarium)."¹⁰⁹ Later on man in society "produit le droit naturel secondaire, jus naturae secundarium, ou le droit des gens primaire, jus gentium primarium (primum)."¹¹⁰

Besides these two, however, there existed

... un droit mixte composé d'elements de droit des gens et de droit civil, et que, pour

108 Ibid., 41.

109 Ibid., 38.

110 Ibid., 39.

ce motif, on appelle proprement le droit des gens
secondaire, le jus gentium secundarium.¹¹¹

(Grotius, Kusters adds, even subdivides this secondary (jus gentium).¹¹²

This is the doctrine of the De Jure Praedae.

In the De Jure Belli ac Pacis, however, we find an immediate division into natural law and jus gentium.¹¹³ Examining natural law we

conclude "se compose donc de principes de la droite raison".¹¹⁴ Hence,

Kusters exclaims:

Voila pour le droit naturel. A l'opposé de
ce que nous voyons dan l'oeuvre de sa jeunesse
Grotius abandonne maintenant tout à fait la théorie
d'Ulpian, ... la distinction entre un droit naturel
primaire et un droit naturel secondaire.¹¹⁵

And turning to jus gentium we see there has been here another about
face, as Dr. Kusters points out

... comme droit volontaire, ne concerne pas
les actions qui sont bonnes ou mauvaises en elles-
mêmes, mais rend celles - ci obligatoires ou illic-
ites, uniquement parce que ce droit les commande ou
les prohibe. Le droit des gens est un, droit humain,
un droit positif; il emprunte d'ailleurs sa force
obligatoire à la volonté unanime de tous les peuples
ou de la majorité d' entre eux.¹¹⁶

Here, then, a couple of points are explained for us. The evolu-

111 Ibid., 39.

112 Ibid., 39-40.

113 Ibid., 43.

114 Ibid., 41.

115 Ibid., 45.

116 Ibid., 45-6.

tion of Grotius' thought according to Kouters, is clarified. The distinction between natural law and jus gentium is manifest. And, by way of concluding this rather lengthy explanation, we can point out one other observation of Jean Kouters. His words are self-explanatory.

Dans tout cela on ne peut nier, nous semble-t-il, l'influence de l'ouvrage de Suarez, paru entretemps.

If, then, jus gentium is not natural law, it must be voluntary according to Grotius' division, that is, positive.¹¹⁸ And still it is not any voluntary or positive law. For, as we saw in Dr. Kouters' interpretation, it arises from human will. Hence, it is not divine but human voluntary law.

But a clearer definition of the concept is still necessary, since human positive law is three-fold as we saw above. Jus gentium voluntarium is, however, distinguished from jus voluntarium arctius sumptum, since the former obtains in a perfect society; the latter, only in an imperfect society. Too, it is distinguished from municipal law; "Itaque haec duo (jus naturale et gentium) non minus inter se quam a jure civili discernere semper unice laboravi".¹¹⁹ And how does Grotius achieve his purpose? "Civile est quod a potestate civili proficiscitur",¹²⁰ and, consequently, it applies to one state. Jus gentium, however, "est quod

117 Ibid., 46.

118 Grotius uses the word voluntary in opposition to the term natural. (cf. Epistle to his Brother, transl. by H. Wright, Bibliotheca Visserana, VII, 210.

119 De Jure Belli ac Pacis, Prol., 41.

120 Ibid., I, 1, 14, 1.

gentium omnium aut multarum voluntate vim obligandi accepit".¹²¹

Jus gentium should neither be confused with civil nor natural law, then, nor with "pactis populorum" as Grotius says in another place.¹²² But we ask, if not from civil power or pacts, whence is this law? It is derived from common consent as Grotius affirms in many places.¹²³ Dr. Verdross, again, speaks to our purpose.

Hugo Grotius continue la route préparée par Vitoria, Suarez, et d'autre théologiens moins connus comme Soto et Convanuvias ... La société du genre humain ... ne peut subsister sans respecter quelque sorte de droit, tendant à l'utilité de la communauté universelle. Ce droit se divise d'apree lui aussi, en droit naturel et en droit positif. Mais également ce dernier, créé par le consentement universel ou quasi universel que lui accordent les peuples est fondé sur le droit naturel, à savoir sur le principe de la fidélité à ce qu' on a promis, c'est-à-dire sur la règle pacta sunt servanda.¹²⁴

This last statement admits of three important corrolaries. The first is that jus gentium is founded alike on the natural law and the universal consent of the peoples of the world. The second is that this law must, originally at least, be unwritten. (Grotius implied this conclusion in his Prolegomena;¹²⁵ he actually stated in chapter one of the first book that the force of jus gentium is derived "pari modo quo jus non scriptum civile, usu continuo et testimonio peritorum".¹²⁶

121 Ibid., I, 1, 14, 2.

122 Ibid., III, 2, 7.

123 cf. Ibid. II, 3, 10-11; II, 17, 19; III, 19, 11; Prol., 1 and 17.

124 Verdross, "Droit de la Paix", 284.

125 De Jure Belli ac Pacis, Prol., 26.

126 Ibid., I, 1, 14, 2.

The third corollary is this, derived as much from all we have said as from the last quotation: there is an obligation consequent on this law of nations. As with other authorities, so with the Dutch jurist, this obligation is from the natural law, as well as from jus gentium in its own right. From natural law, because "juris naturae fit stare pactis".¹²⁷ "Nam in jure gentium jus naturae includitur, ita ut ex omnibus delictis puniri jam ... possit".¹²⁸ From jus gentium itself, because: 1) only a perfect society can accomplish a law under jus gentium;¹²⁹ 2) reasonable necessity demands its observance. For

Nulla est tam valde civitas quae non aliquando aliorum extra se ope indigere possit ... Si nulla est communitas quae sine jure conservari possit ... certe et illa quae genus humanum ant populos complures inter se colligat, jure indiget.¹³⁰

And this obligation Grotius insists on (in the face of present-day skepticism and Austinian law) as binding even though a sanction be wanting. "Neque tamen quamvis a vi destitutum jus omni caret effectu ...". The ultimate reason, of course, is that God's justice is not to be frustrated.¹³¹

As we have heard Grotius and his commentators step by step, so let us conclude with a word from him and them, by way of summary: I am

127 Ibid., Prol., 15; cf. also Prol., 25.

128 cf. Ibid., II, 18, 4.

129 cf. Ibid., I, 3, 4.

130 Ibid., Prol., 22-23.

131 Ibid., Prol., 20.

fully convinced, Grotius asserts, that there is a common law among nations.¹³² Consequently,

Sicut cujusque civitatis jura utilitatem suae civitatis respiciunt, ita inter civitas aut omnes, aut plerasque, ex consensu jura quaedam nasci potuerunt, et nata apparet, quae utilitatem respicerent non coetum singulorum sed magnae illius universitatis. Et hoc jus est quod gentium dicitur, quoties id nomen a jure naturali distinguimus.¹³³

So, there is not only the civil law of the state benefiting its citizens but also international law for the benefit of the world community of states. The term Grotius uses for international law is jus gentium. The meaning of this term is evident to us now as we look back over what we have studied. First, "in jure gentium jus naturae includitur", which, translated into terminology we have been using, means there is a natural international law. Secondly, jus gentium is, nevertheless, a law in its own right. It is positive, human, ex consensu, for the common good, and, by implication, unwritten. Or, as Kouters states it: "Le droit des gens est un droit humain, un droit positif; ... du droit non écrit, du droit coutumier".¹³⁴

Having concluded our study of the founders of modern international law, we now turn to an analysis of its 20th century defenders. We re-

132 Ibid., Prol., 28.

133 Ibid., Prol., 17. N.B. Whewell translates jus gentium as international law.

134 Kouters, Les Fondements, 45 and 46.

for to the Sovereign Pontiffs who have reigned during the two world wars. And first, of course, to Benedict XV.

D. BENEDICT XV.

In September, 1914, Giacomo Cardinal della Chiesa was elected pope. In the last days of July and the first of August, Europe had become involved in its first World War. Providential was the election of Benedict XV, who but four months before had been created a Cardinal. A doctor in law from the Royal University in 1875; a specialist in diplomacy from the Pontificia Academia dei Nobili Ecclesiastici by 1883; an experienced diplomat with service in the papal secretariate since 1887, Benedict had the legal and diplomatic background most helpful in his position.¹³⁵

With the assistance of "an unusually gifted Secretary of State, Cardinal Gasparri"¹³⁶ Benedict dedicated his pontificate, first, to ending the war and negotiating a peace; and, secondly, to pointing the way of charity and justice in the conduct of both war and peace. Thus in the course of his eight-year pontificate, Benedict called to the world's attention the existence of a norm of international conduct. What Benedict's conception of this norm was we now wish to examine.

¹³⁵ Principles of Peace, Selections from Papal Documents, Leo XIII to Pius XII, ed. by H. C. Koenig, N C W C, Washington, D.C., 1943, p. 126.

¹³⁶ Ibid., p. 127.

Now, in counter-distinction to the trinity of the Spanish School of international law, the Pope never sat down with express purpose of writing an organized treatise on law. Hence, our approach to Benedict presents a nice problem in historical method. First, from what Benedict said, especially in his peace messages to belligerents, and, secondly, from what he and his Cardinal Secretary intimated on various occasions, we shall try to piece together a coherent concept of international law.

In his first Encyclical letter, Ad Beatissimi, Benedict points out that as

... We have held it to be our duty at the very beginning of our supreme Pontificate, and as the first act of our Apostolic ministry, to take up and repeat the last words that fell from the lips of our predecessor ...¹³⁷

The Pope makes his own the plea of Pius X. But what was this plea? On August 2, almost the very day the war began, Pius X had uttered his last plea for peace. It concluded:

We do exhort the Catholics of the whole world to turn ... to His throne of grace and mercy ... that God may be moved to pity ... and inspire the supreme rulers of the nations with thoughts of peace and not of affliction.¹³⁸

137 Ibid., par. 275. N.B. In conformity with Koenig's own reference scheme this and all succeeding references to Principles of Peace will be by paragraph numbers.

138 Ibid., 274.

One phrase here catches our eye: "thoughts of peace". Surely, Pius was not being obscure at such an hour: surely his hearers knew what his "thoughts of peace" were. We page back through the papal messages. On May 25, 1914 we find the Pope had delivered an allocution to the College of Cardinals in which he outlined among other things the "thoughts of peace".

True, there are clever and distinguished statesmen who put before themselves the good of nations and indeed of human society, and seek by common agreement for the means of arresting the harm that comes from the strife of classes and the slaughters of war, and of securing within and without their borders the benefits of peace. These, without doubt, are excellent endeavors but their councils will bear little fruit unless at the same time they can ensure that the precepts of justice and Christian charity are deeply rooted in souls.¹³⁹

This is the peace message Benedict was recalling in his first Encyclical. Let us examine the message carefully, since it contains several points of interest.

- 1) "... statesmen who put before themselves the good of nations and indeed of human society ...". The purpose of diplomacy and all international relations is thus stated. And from another aspect, the common good as a guide for international action is designated.
- 2) "... seek by common agreements ... within and without their borders ...". Here are the means to the end, i.e. common agreements for the common good. Note that common agreements could at most be positive law in the mind of one trained in Christian philosophy and theology,

¹³⁹ Ibid., 272.

divine, civil, and ecclesiastical law. Note, too, that these agreements are "common" and, also, "without their borders", that is, between nations.

3) "... ensure that the precepts of justice and Christian charity are deeply rooted ...". The Pope here states the motivating force in using the means to the end in view. "Precepts of justice", for one conversant with the scholastic tradition of thought, would necessarily involve the whole question of reciprocal rights and duties, and, in the light of the above, the question of rights and duties in the state and between states. "Christian charity" harkens back to the interdependence brought out by Suarez and Grotius especially. -- Not to do unto others as you would have them do to you is the surest way to national and international anarchy.

With this message taken from his predecessor, Benedict XV began his pontificate. One year later the Pope returned to the same theme

Why not from this moment weigh with serene mind the rights and lawful aspirations of the peoples? Why not initiate with good will, an exchange of views directly or indirectly, with the object of holding in due account, within the limits of possibility those rights and aspirations, and thus succeed in putting an end to the monstrous struggle ... The equilibrium of the world, and the prosperity and assured tranquillity of nations rests upon mutual benevolence and respect for the rights and the dignity of others.¹⁴⁰

Peoples still have rights, and, hence, others still have duties. There-

fore, why not by exchange of view, thru general agreement, arrive at some norms for a working international order. That the existence and observance of such a law is necessary we can see from this that right reason demands "assured tranquillity of nations" and this in turn "rests upon mutual benevolence". Benedict is emphasizing a point more fundamental than the positive law pleaded for by his predecessor. He is stressing the international application of the natural law. "Pacta sunt servanda", he might well have said. For the phrase "entrust ... settlement ... to reasons of equity and justice" is like saying base your rules of international conduct on the natural law.

Two more years pass. On August 1, 1917 Benedict issued his now famous Peace Note to the warring nations, Des le Début. After showing the continuity of his efforts during the three years of war, the Pope announces his "desire to put forward some more concrete and practical propositions".¹⁴¹ Without quoting the entire documents, we can examine with profit certain selections of this peace message:

1) "First of all, the fundamental point must be that the moral force of right shall be substituted for the material force of arms."¹⁴² This sounds like the "reasons of equity and justice" of 1915 or Pius X's "precepts of justice" in 1914. Further, in view of his avowed purpose to give specific proposals, this first statement is especially inter-

141 Ibid., 525.

142 Ibid., 525.

esting. For the Pope seems to be saying to himself that no matter how practical the positive laws and agreements are made, they are useless unless founded ultimately on the natural law, which must have its application in international as well as individual relations. All of which brings us back to an idea which our international lawyers of the Spanish school have each expressed: there is an international natural law. Further, we see here as elsewhere, that the Pope distinguishes agreements between nations from natural law and yet founds the obligations of such pacts on the same natural law.

2) "Let all obstacles to free intercourse of peoples be swept aside, in assuring by means of rules, to be fixed in the same way ..." ¹⁴³

We break in to ask the meaning of the words "fixed in the same way" and the Pope answers:

"As a substitute for armies, (there should be) the institution of arbitration, with its high peace-making function, subject to the regulations to be determined against the State which would refuse either to submit international questions to arbitration or to accept its decision."¹⁴⁴

Note here three things, not new it is true, but put in a different light. a) The institution of arbitration follows "regulations agreed upon". Whence it follows that such rules are human and positive since they are founded on consensus. b) Sanctions are permissible both to

143 Ibid., 526.

144 Ibid., 525. The phrase in brackets is added.

give force to the pacts and because the pacts are binding. c) The points at issue here are "international" questions.

3) In succeeding propositions the Pope constantly speaks of weighing cases "justly and equitably"¹⁴⁵ and this with a view to "bringing ... particular interests into harmony with the general welfare of the great community of mankind".¹⁴⁶ Let us note, again, three things: a) that the natural law is ever invoked as the basic principle; b) that this norm in effect is the bonum commune; c) that there is an international community, mankind, that needs rules.

This is Benedict's peace plan as viewed from the vantage point of international law. Let us turn, now, to the other writings of the Pope or his Secretary of State and see what additional knowledge we can glean.

In an attempt to guard against the misinterpretations of the papal peace proposals Cardinal Gasparri wrote a letter to Lloyd George of England and another to Archbishop Chesnelong of Sens. In various places in these letters the Secretary of State brings home one important point, namely, that "the only practical ... way of effecting this (peace and international order) is ... a pact among civilized nations...".¹⁴⁷ "A little good-will" and "by common accord among civilized nations"¹⁴⁸ are expressions he uses elsewhere. The Pope was evidently pleading for an

145 Ibid., 527; cf. also 528, 529 and 530.

146 Ibid., 529.

147 Ibid., 541.

148 Ibid., 547.

international norm but one which was founded on common consent of the nations. We ask: is this law different from the natural law?

The Pope answers, speaking to Archbishop Dobrecic of Antivari

We have, indeed, no doubt but that those at the head of affairs in your kingdom following the law of nations and at the same time the voice of humanity, are disposed to treat with clemency and kindness those most unfortunate men (prisoners of war) ...¹⁴⁹

Again, addressing Cardinal Vannutelli, dean of the Sacred College, he says

In Our first Encyclical ... we exhorted the Governments of the belligerent nations that ... they should make haste to give back to their peoples the life-giving benefits of peace ... But ... the voice of the friend and the father was not listened to; the war continues to ensanguine Europe, and not even do men recoil from means of attack, on land and on sea, contrary to the laws of humanity and to international law.¹⁵⁰

Obviously, a phrase like the "principles of humanity" means the natural law to Benedict.¹⁵¹

Further, on one occasion Pope Benedict makes a distinction between the law of nations and divine law.¹⁵² And in the case in point, the divine law covers ministers of religion and sacred things, whence it can be inferred that the divine law here spoken of is divine positive law, as opposed to human positive law.

149 Ibid., 298.

150 Ibid., 360.

151 Ibid., 383 and 462.

152 Ibid., 494.

Other readings show that the Pope likewise distinguishes between various types of human positive law. For, not to repeat what we have seen in the Pope's peace messages, we can cite several places where Benedict uses the term "law of nations" or "international right" to mean only a human positive law based on consensus.

1) "His Holiness ... has not failed (to insist) ... that the war be conducted in conformity with recognized principles by virtue of which open and undefended cities are to be respected and the monuments and churches which form their precious treasure are to be safe-guarded from all harm"¹⁵³

2) "The undersigned Secretary of State of His Holiness begs to call the attention of your Excellency to the decree by which the Italian Government has established that on the date of publication of said decree (August 25, 1916) the Palazzo di Venezia, in Rome, becomes property of the State. The Holy See does not intend at the present moment to consider whether the motives given in the decree are sufficient to justify the taking possession of the Palazzo di Venezia, either in respect to moral law or international right."¹⁵⁴

3) "But We have already remarked your (the Roman Nobility) zeal for justice in the words with which ... you have condemned the methods of war which are not in conformity with the dictates of the law of nations. In this you have associated yourselves with Us, who ... have even recently raised our voice against any form of war which, waged on undefended cities ... has made victims among non-combatants and ... has damaged the sacred inheritance of religion and of art ..."¹⁵⁵

153 Ibid., 438.

154 Ibid., 462.

155 Ibid., 563.

Clearly, the "recognized principles" of example one are the "law of nations", of example three since the subject matter referred to is the same. However, from example two, where the move of the Italian government is unjustifiable "either in respect to moral law or international right", this law of nations seems to admit a double aspect: a natural and a positive. It follows, then, 1) from the terminology (moral law, principles of justice, etc.) that the Pope is applying natural law to the inter-relations of nations; 2) from the nature of many of the examples cited that the law covering them is positive in character, set up by agreement among the various nations.

From what has gone before it seems fairly clear that the norm for international order Benedict XV is appealing to is nothing but the international law we have seen in Vitoria Suarez, and Grotius. First, it is natural; secondly, it is positive. Then, as positive it is human, as opposed to divine, positive law; (it is international as opposed to intra-national); and it is based on consent. And whence the obligation of this international law? Its binding force stems as we saw 1) from pacta sunt servanda, i.e. from the natural law; 2) it stems from universal consent for the common good, which in turn is based on the exigencies of the community of mankind. The Pope himself seemed to summarize his own doctrine in asking prayers for the Paris Peace Conference, when he begged

"that the fruit of the approaching congress may be that great gift of heaven which is true peace (founded on the principles of Christian

justice ...¹⁵⁶ (and) social unity ... founded on natural benevolence".¹⁵⁷

E. PIUS XII

In 1914 we saw Cardinal della Chiesa become Benedict XV. That same year the Pope appointed a young monsignor Secretary of the Sacred Congregation for Extraordinary Ecclesiastical Affairs. The monsignor was eminently fitted for his work. He had passed his boyhood with his father who was the dean of the Vatican law corps. After ordination he had spent several fruitful years as a professor of law in the Roman Seminary. Later he was invited by Cardinal Gasparri to enter the papal secretariate, where he was occupied at the time of his advance to the Papal household in 1914. From 1914 to 1939 the same monsignor, who became successively Archbishop, Papal Nuncio, Cardinal and Camerlengo, was constantly occupied in the diplomatic work of the Church. On March 2, 1939 this prelate became Pius XII, the reigning Holy Father.¹⁵⁸

In office but a few months Pius was confronted with a situation similar to that of Benedict XV. He saw war flame up in several quarters in Europe and from thence spread rapidly as an all-consuming conflagration, to the entire world, from pole to pole, to every sea and land on the globe.

In the midst of this Pius XII has stood, the guardian of the human

156 Ibid., 601.

157 Ibid., 612.

158 Ibid., p. 552-3.

family, the advocate of order in every sphere of society. It is with interest, then, that we turn to a professor of law, a diplomatist, the defender of international order for a final word of explanation on international law in our own day.

Pius XII in his first encyclical letter, Summi Pontificatus, dealt with the function of the State in the modern world. At the outset he tags the basic evil of the political order

Ac principio, compertum omnino est primum altioreque malorum fontem, quibus hodierna afflictaur civitas, ex eo scater, quod universalis de morum probitate pernegetur ac rejiciatur norma, cum in privata singulorum vita tum in ipsa re publica, atque in mutuis necessitudinum rationibus, quae inter gentes nationesque intercedunt; ipsa videlicet naturalis lex detrectatione oblivioneque obruitur.¹⁵⁹

We see immediately that the Pope applies the natural law to individuals, to society, to international relations. And what happens when these States reject the natural law? "In multiplicatis variisque erroribus (incidunt quorum) duo capita peculiari modo ... considerationi diligentiaeque vestrae proponimus".¹⁶⁰

The first of these errors is the forgetfulness and rupture of human solidarity "quam quidem cum communis origo postulat, ac rationabilis omnium hominum naturae aequalitas, ad quaslibet iidem gentes pertineant,

159 Acta Apostolicae Sedis, XXXI (1939), 423.

160 Ibid., 426.

tum Redemptionis sacrificium praecipit ...".¹⁶¹ In succeeding paragraphs Pius explains each of these fonts of unity. One passage in particular is of interest to us.

Et cum gentes ad humaniorem cultum evehantur et ... conditionibus inter se dissimiles fiant non idcirco debent humanae familiae unitatem infringere sed eandem potius familiam ... ditare, itemque mutuo illo bonorum commercio, quod solummodo efficienterque haberi potest, cum ... caritas omnes ejusdem Patris filios omnesque eodem divino cruore redemptos homines fraterno foedere coagmentat.¹⁶²

In subsequent considerations we will have occasion to refer to this passage.

The second error under which modern society labors is the absolutism of the state.¹⁶³ Here, again, the Pope develops at some length the consequence of this doctrine, on the family, for example, on education, on the Church, and religion. And he adds:

Opinatio illa, Venerabiles Fratres, ... non internae tantum nationum vitae et auctoribus componendis incrementis perniciosus error evadit, sed mutuis etiam populorum rationibus detrimentum affert; quandoquidem unitatem illam infringit, qua civitates universae inter se continerentur oportet, gentium jura vi firmitateque exuit, atque vitam ... pacate una simul tranquilleque vivere perdifficile reddit.¹⁶⁴

161 Ibid.

162 Ibid., 427-8.

163 Ibid., 430.

164 Ibid.

The human race, the Pope reasons, is in the natural order of things divided into separate states and peoples, each independent in its own sphere, yet all are bound together (by reason of the unity we spoke of above) into a supra-national society. Consequently, for the State to assume absolute right, is contrary alike to the natural law and "peculiaribus ... normis"¹⁶⁵ by which the unity and prosperity of the human family is maintained.¹⁶⁶

Three passages follow which are especially pertinent to our investigation. (We quote the official translations for reasons that will appear presently.)

- 1) "So, Venerable Brethren, it is indispensable ... that the peoples recognize and observe these principles of international natural law ..."167
- 2) Such principles demand ..., further, fidelity to compacts agreed upon and sanctioned in conformity with the principles of the law of nations.167
- 3) But, on the other hand, to tear the law of nations from its anchor in divine law ... is to dethrone that very law ...168

Let us add to this a passage from In Questo Giorno, the Five-Point Peace Plan of Pius XII.

- 4) 'We have been forced to witness a series of acts irreconcilable alike with the precepts of positive international law and those of the law of nature ...169

165 Ibid.

166 Ibid.

167 Koenig, op. cit., paragraph 1430.

168 Ibid., 1431.

169 Ibid., 1493. Note: the italics in the above quotations are mine.

In speaking of international relations Pius XII, we see, uses five different terms: 1) "Law of Nations"; 2) "International Natural Law"; 3) "Divine Law"; 4) "Positive International Law"; and 5) "Law of Nature". Were we to understand and, if necessary, reconcile this terminology we would have a fairly clear notion of what the Holy Father means by international law.

The terms "international natural law" and positive international law" seem most familiar, so let us start with them. The original Latin of the former reads: "... naturalis juris principia ac normas, quibus nationes inter se contineantur ..."¹⁷⁰ The latter phrase is originally in Italian and reads: "... dritto internazionale positivo".¹⁷¹ In the first case, the Pope is emphasizing a basic truth which we saw almost taken for granted by Vitoria and Suarez, but which juridical positivism of the modern day challenges: there is a natural law, the foundation of all positive laws, and this applies not only to men personally but also collectively.¹⁷² In the second case, the Pope shows that he recognizes the necessity of more than general principles for governing the interrelations of nations and, hence, postulates a positive international law. (We will take up further refinements of this notion in a moment under the title "Law of Nations".)

Now the fifth term, "law of nature", is just another way of saying

¹⁷⁰ A. A. S., XXXI, 554.

¹⁷¹ Ibid., XXXII, 8.

¹⁷² cf. supra, p. 70.

the natural law. Hence, when put in original context we see again that Pius is opposing a natural law applied to nations and a positive law having the same extension. We might note in passing that this is the distinction Suarez made when he said the society of nations needs a law

Et quamvis magna ex parte hoc fiat per rationem naturalem; non tamen sufficienter et immediate quoad omnia; ideoque aliqua specialia jura potuerunt usu earundem gentium introduci.¹⁷³

This very distinction Suarez is making is found again in the third passage quoted above, where the Pope speaks of tearing the "law of nations from its anchor in divine law ...". Two steps are required for this proof, however. We must show that the divine law as here used equals the natural law, and, further, that the law of nations is a synonym in the Pope's mind for positive international law. The first step is easily shown by reading on in the encyclical. The Pope was saying that mutual trust is the pre-requisite for international agreements. Now, he says, to tear the law of nations (according to which these agreements are made) away from divine law is to smash the foundations of human trust. However, he continues,¹⁷⁴ it may be necessary to revise treaties once made. If so, let it be done with justice and equity, otherwise we will experience the very rending we caution against, "the natural order would be destroyed...".¹⁷⁵ The law of this order,

173 De Legibus, II, 19, 9.

174 Koenig, op cit., 1431 and 1432.

175 Ibid., 1432; also 1433 and 1434.

of course, is natural law. The synonym used for natural law is divine law since ratione causae efficientis both are the same.

It remains, then, to clarify the first term, jus gentium.

In his Christmas allocution of 1939 the Pope mentions 1) atrocities; 2) unlawful use of weapons against civilians and refugees; 3) disregard for dignity, liberty, and life; and 4) anti-Christian propaganda, as violations alike of natural and positive international law.¹⁷⁶

The following Easter the Pope again stressed the horrors of war:

- 1) in undefended cities, towns, and villages terrorized by bombing;
- 2) among unarmed citizens, the sick, and the helpless turned out of their homes and often killed.¹⁷⁷

These, the Pope said, were against those "jura ... quibus excultae gentes inter se continentur".¹⁷⁸

These passages would indicate that jus gentium was a collective term in Pius XII's writing for natural and positive international law. However, in an allocution on the Feast of St. Eugene, the Pope mentions that respect for life, honor, and property of citizens; for the family and its rights, for religion, public and private, should in occupied territory be had in conformity with international law and the natural

176 Ibid., 1493.

177 Ibid., 1539.

178 A. A. S., XXXII, 50.

order.¹⁷⁹ --The Italian, of which "international law" is a translation, reads diritto delle genti.--¹⁸⁰ Here, then, the Holy Father seems to distinguish between natural order and jus gentium as between natural and positive law.¹⁸¹ Yet the Pope does not hold this jus to be any sort of law. Rather, it is law established by the civilized nations, "des accords internationaux".¹⁸² Consequently, it is a law stemming from the consent of men. It is positive and human and founded on general agreement.¹⁸³

There remains but the question of obligation imposed by this law. We see the force of the Pope's international law is derived from a double source: the natural law and the common agreement of the nations. The law of nations must be anchored in the divine law, as we saw.¹⁸⁴ The nations will achieve a stable international organization only when they drop "une morale aux fondements purement humaine (and) ils acceptent l'autorité suprême du Createur comme base de toute morale individuelle ou collective ..."¹⁸⁵ Hence, we repeat with the Pope that "naturalis lex (obtinet) ... in mutuis necessitudinum rationibus, quae inter gentes nationesque intercedunt..."¹⁸⁶ And, we recall the ever insistent ad-

179 Koenig, *op. cit.*, 1567 and 1568.

180 *A. A. S.*, XXXII, 273. cf. also Koenig, 1644, 1720, 1721 and 1758 for further confirmation of this interpretation.

181 *A. A. S.*, XXI, 368-9; also Koenig, 1431.

182 *Ibid.*, XXXI, 368-9; Koenig, 1514.

183 Koenig, 1644, 1757, 1758 and 1761.

184 *Ibid.*, 1431.

185 *A. A. S.*, XXXI, 675.

186 *Ibid.*, 423.

monition of the Pope that any order must of necessity be based on mutual trust,¹⁸⁷ the pacta sunt servanda of the three founders of modern international law.

That obligation also flows from consent is at least implied in the Pope's writings. And this, first, from the general argument of the Summi Pontificatus itself. Herein the Pope shows, as Suarez argued, that the nations are bound by the several ties of unity, which create, over and above the obligations of the natural law, reciprocal rights and duties.¹⁸⁸ This same argument is confirmed in an address of the Pope to the Knights of Malta:

Long before civilized nations had established international law, a long time before they had given reality to the dream - not yet effectuated - of common force in defense of right and human liberty, of the independence of peoples, of peaceful equity in their reciprocal relations, the Order of St. John ... had gathered...¹⁸⁹

Here, then, is the international law of which our present Sovereign Pontiff is the defender. Its nature: on the one hand, natural and on the other, positive. Its force: that of the natural law itself and that of the unity¹⁹⁰ and (it would seem) the consent of the majority of peoples.¹⁹¹

187 Koenig, 1431, 1493 et al.

188 Ibid., 1436 and 1446.

189 Ibid., 1514.

190 P. Hughes, "The New Encyclical", Dublin Review, Vol. 206 (1940), p. 13. --The whole article is valuable as a summary of the argument in the Summi Pontificatus.--

191 Koenig, 1319.

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This last point, which was hinted at previously, we must now return to before concluding our consideration of the elements of international law. It is the question of the consent of the majority. In the De Indis III, Vitoria spoke of "consensus majoris partis totius orbis".¹⁹² In the De Legibus, Suarez spoke of jus gentium as that law on which all agree or "fere omnes".¹⁹³ Grotius explains the same delimitation in Book I, 1, 14, after the phrase "multarum addidi".¹⁹⁴ The Popes, too, speak of a general agreement among all men or at least a majority of them. Why this distinction? Why the insistence on at least "fere omnes"? The reason appears to be that thus our authorities safeguard the true legal nature of their jus gentium. The matter may be further clarified in the following few statements.

- 1) There is the natural law which applies to men either individually or collectively. Therefore, there can be said to be a natural international law.
- 2) There are rules of international conduct which are founded on the consent of all or at least a majority of the nations.
- 3) There are treaties which govern the interrelations of two or a few states. Both of the latter (the rules and the treaties) are international, i.e. between nations. But only the first of the two is law.

192 cf. supra, note 22, p. 37.

193 De Leg., II, 19, 6.

194 cf. supra, note 106, p.60.

Treaties partake, rather, of the nature of a bi-lateral or multi-lateral contract. Hence the distinction between statements two and three is that made between law properly so-called and law analogo sensu. Rules of the second type are international law strictly; pacts and treaties of the third type are international, but only analogically law.

On this last note we end our discussion of the elements. It only remains for us to piece the contributions of our quintette together into a complete whole, a definition. This definition and its explanation is the work of the final chapter.

CHAPTER IV.

THE DEFINITION

Logicians teach us that a definition according to cause is desirable and useful when at all possible. The reason for this, of course, is clear, since an explanation according to ultimate causes probes the very ontological foundations of the thing defined.

Following this general principle, let us use the outline of law according to its constitutive parts, which Suarez put at our disposal on a previous page,¹ and build our definition accordingly. Suarez showed us that the constitutive part of law had two elements: an internal and an external. The former was the essence of the law; the latter were its efficient and final causes.

What, then, is the essence of international law? What are its efficient and final causes? We will draw on the material the founders and defenders of international law have furnished us to answer these questions.

1. The essence of the law. When we broke down (in a somewhat analogous fashion) the essence of law, we saw that it consisted of a materia circa quam, human acts, and a forma, the ordination of the legislator's intellect and will. The application to our case is readily

1 cf. supra, p. 44.

perceived. The materia circa quam of international law would be the acts of the states that constitute the family of nations. For just as the acts of individuals, who make up the independent states, are subject matter for civil legislation, so too the acts of perfect societies in international relations are the subject matter of international law. This, we can affirm, was the common teaching of our authorities, whether we view international law in its natural or positive aspect. As for the form, so-called, of international law, we can look to that ordination of reason which directs the acts of nations to the common good of the community of nations. Now, we saw that our consultants were in agreement on this particular point even under the dual aspect of international law. For, 1) by reason of the natural law internationally applied and 2) by positive international legislation the equilibrium of global society is achieved. In fact as we heard Suarez clearly say earlier

"Numquam enim illae communitates adeo sunt sibi sufficientes singillatim, quin indigeant aliquo mutuo iuvamine, et societate ... Hac ratione indigeant aliquo jure ... Et quamvis magna ex parte hoc fiat per rationem naturalem; non tamen sufficienter et immediate quoad omnia; ideoque aliqua specialia jura potuerunt usu earundem gentium introduci."

From this it is evident, too, that recta ratio here is partly that dictamen which God put in human nature itself and partly the consent

2 De Leg. II, 19, 9.

of the majority of the nations of the world.

From the fact that international law is positive, two other considerations are worth noting in passing. One is that if this law is derived from the consent of the majority of nations, it is not one with the pacts and treaties which two or three states would make with one another. Further, if it is basically ex consensu (and, especially, if it is derived from common custom) it will probably be unwritten law, as Suarez definitely holds and Vitoria and Grotius also assert.

Therefore we again have agreement among our authorities. International law for them would be an ordination both as a dictate of nature and as a majority consent of the nations.

This, then, establishes the two internal elements, the essence, of international law. But what of its external causes?

2. The final cause. Here we need not delay, for it is obvious that the common good is the object of international law either under its natural or positive aspect. For Vitoria, Suarez, and Grotius, as well as the Popes, all pointed out the solidarity and unity of the human race. And this, they affirmed, not only from the anthropological point of view, but especially by reason of a unity of intellect, a social nature of man, an insufficiency (particularly today) of the individual states, and, finally, by reason of a common Redemption, a Brotherhood in Christ and a Fatherhood in God. This, then, is the consensus of

opinion among our advisors. This common good of the family of nations, therefore, adds a third element to our definition.

3. The efficient cause. The efficient cause of law, and hence, of international law is aptly expressed by St. Thomas in the phrase: "ab eo qui curam communitatis habet..."³ According to our authorities, the world community lies under a natural and a positive international law. Now, the natural law has its "legislator", if we may use the term, in human nature. Hence, we understand why Suarez, Grotius, and Pius (also Vitoria and Benedict implicitly) drew analogies between the relations of individual to state and state to family of nations. The person is to the state, they would argue, as the moral person (the state) is to the supra-state (the family of nations).⁴

On the other hand, for the legislator of positive international law we have but to look back at what we saw at the very end of the last chapter. There all the authors spoke of the common or nearly common (fere omnes) consent of the nations. There we find the real efficient cause of this aspect of international law. As the people are the proximate source of authority in the state, so the states are vested with authority in the international sphere. As the individuals can delegate authority to one or a group, or retain their authority in the body politic, so the states can set up a supreme arbiter, a league of nations,

3 S. Theol., I-II, 90, 4, resp.

4 cf. same argument in Meyer, Institutes Juris Naturalis, Herder, Friburg, 1900, II, 749.

or keep authority in their own hands. Now, ultimately the most practical sign of the consent of the governed is the mind or opinion of the majority.⁵ Hence, Suarez and the others insist on at least a

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- 5 This is true, of course, as long as superior laws are not contradicted. Note: The legal positivist of today would obscure, if not deny, the existence of any custom-induced law. The basic reason for this is an ill-conceived notion of civil society, in general, and of sovereignty in particular.

When we are speaking here we are limiting ourselves to a consideration of civil states only, i.e. of those stable moral unions of families (and men) which under an independent authority seek to achieve common goals in the temporal order by common means. Now, for such a moral union to exist, an authority is essential. Further, such an authority is essential as can impose a real obligation on its subjects, i.e. the authority must be that of a juridical society. But, it will be asked, by what right a state can impose obligations on its members? In this case, the answer is: it imposes obligations by the authority of the members who have freely granted the necessary power to the ruler or group of rulers to direct them in the achievement of the natural goal of civil society.

It is right here that the connection is made between sovereignty of the people and the legal force of custom. For, as Suarez says, the efficient cause of a custom is, proximately, the people who induce it and, primarily, the power which admits it. Now, from what has been said of the people in civil society, it follows that they both establish customs and have the authority. Hence, not only do they induce customs but they are vested with the necessary authority to admit the customs thus induced. For the people who voluntarily act in a reasonable matter and act continually and publically after a definite manner, thus induce a custom and really fulfill the conditions, as Suarez points out, (*De Leg.*, VII, 9.) necessary to lay down a law: 1) reasonable subject matter, 2) real authority, 3) voluntary action.

But it will be objected, in most states the people once they have invested representatives with authority no longer have immediate exercise of that authority. On the contrary, as St. Thomas well observes (I-II, 97, 3 ad 3), even in a community already under authority "consuetudo in tali multitudine praevalens obtinet vim legis, in quantum per eos tolleratur ad quos pertinet multitudini legem imponere; ex hoc enim ipso videntur approbare quod consuetudo introduxit." (All this, of course, applies only to a custom which introduces an entirely new practice and not to a custom that deals with an already existing law. For, in the latter case numerous other distinctions are necessary before one

majority consenting to a certain line of conduct, otherwise legislative power would be lacking.

Whence follow two important conclusions: 1) That the consent of the majority as the signum of the "consent of the governed", enacts a true law; 2) that treaties and agreements between two or a few nations are not true laws, are not international laws unless, as we showed above, the term is analogously applied.

Two objections might here be raised: The first states that there is no instrumental cause, no promulgation connected with positive international law, especially if un-written. This, however, is seen to be false on two scores. For we just said that the consent of the majority constituted a signum legis. And, even if the law be un-written, the customary actions of men are a sufficient sign of the popular mind, and hence an adequate instrumental cause as Suarez specifically pointed out. The second objection insists on a more fundamental point. It denies positive international law a ratio sufficiens. Again, we have seen Suarez handle this very point. He told us that the natural law held for international relations but that over and above it special jura were needed. In this the Popes, as well as Vitoria and Grotius concurred. However, if the argument of ratio sufficiens be based on the

can determine its legitimacy.) Thus we see, in general, the nexus between the sovereignty of the people and the legal force of custom. The obvious applications to international law and society need not be drawn out.

absence of an international society, we recall that this objection, too, has been handily answered by the authors. For there is such a society. Its basis is, as we saw, the triple unity of mankind.

Here, is the explanation of and the answer to the chief objections against the efficient cause of international law. Here, then, is the fourth and final element necessary to constitute a law. It remains for us actually to formulate our definition. Or, rather it remains to draw into one definition what we have learned from Vitoria, Suarez, Grotius, Benedict XV, and Pius XII. It is really their definition. In one sentence, it would read:

International law is the sum of those ordinations prescribed for the common good of the family of nations consequent on the natural law, the common custom of international society, and the positive legislation of at least a majority of these same nations.

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This is international law as our authors showed it to us. Truly, international; truly law. This is the tap-root of the tree of international relations we spoke of in the beginning of our paper. Then, we knew the goal, but not the way. Now, we know the goal, international peace; we know the directive norm, international law. Then, we knew of order; now we know of international order. And this international order, to conclude on a note sounded at the very outset, this order is the work of international law, its tranquillity is the work of justice, "Opus justitiae pax".

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